

124  
No. 88-1905-CSX  
Status: GRANTED

Title: Eddie Keller, et al., Petitioners  
v.  
State Bar of California, et al.

Docketed:  
May 24, 1989

Court: Supreme Court of California

Counsel for petitioner: Caso, Anthony T.

Counsel for respondent: Rosenthal, Herbert M., Healy, Mary

Entry	Date	Note	Proceedings and Orders
1	May 24 1989	G	Petition for writ of certiorari filed.
2	Jun 21 1989		Brief of respondents State Bar of CA, et al. in opposition filed.
3	Jun 27 1989		DISTRIBUTED. September 25, 1989
4	Oct 2 1989		Petition GRANTED. *****
5	Nov 2 1989	G	Motion of Trayton L. Lathrop for leave to file a brief as amicus curiae filed.
6	Nov 14 1989		Record filed.
		*	Certified copy of original record received.
10	Nov 15 1989		Brief Joint Appendix (Three Volumes) filed.
11	Nov 15 1989		Brief of petitioners Keller, et al. filed.
18	Nov 15 1989		Brief amicus curiae of ACLU filed.
12	Nov 16 1989		Brief amicus curiae of Steven Levine filed.
17	Nov 16 1989		Brief amicus curiae of Robert E. Gibson filed.
19	Nov 16 1989		Brief amici curiae of Washington Legal Foundation, et al. filed.
20	Nov 16 1989		Brief amicus curiae of National Right to Work Legal Defense Foundation filed.
21	Nov 16 1989		Brief amicus curiae of AD HOC Committee filed.
22	Nov 16 1989		Brief amicus curiae of Joseph W. Little filed.
16	Nov 27 1989		Motion of Trayton L. Lathrop for leave to file a brief as amicus curiae GRANTED.
23	Dec 15 1989		Brief amici curiae of State Bar of Michigan, et al. filed.
24	Dec 18 1989		Brief amicus curiae of AFL-CIO filed.
25	Dec 18 1989		Brief amicus curiae of American Bar Association filed.
26	Dec 18 1989		Brief amicus curiae of Lawyers' Committee for the Administration of Justice filed.
27	Dec 18 1989		Brief amici curiae of Beverly Hills Bar Association, et al. filed.
28	Dec 18 1989	X	Brief amicus curiae of California Legislature filed.
29	Dec 18 1989		Brief of respondents St. Bar of CA, et al. filed.
30	Dec 18 1989		Brief amici curiae of State Bar of Wisconsin, et al. filed.
31	Jan 5 1990		CIRCULATED.
32	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 27, 1990. (4TH CASE)
33	Jan 12 1990	X	Reply brief of petitioners Keller, et al. filed.
34	Feb 27 1990		ARGUED.



MAY 24 1989

JOSEPH F. SPANIO,  
CLERK

No. 88-1905-1

In The

## Supreme Court of the United States

October Term, 1988

EDDIE KELLER; RAYMOND BROSTERHOUS;  
DAN M. KINTER; DAVID LAMPE; GARRETT  
BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A.  
GRODNIER; CHRISTOPHER N. HEARD; LEONARD C.  
HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST;  
DAROLD D. PIEPER; THOMAS HUNTER RUSSELL;  
NANCY L. SWEET; MICHAEL J. WEINBERGER;  
DAVID E. WHITTINGTON; THOMAS R. YANGER;  
WARD A. CAMPBELL; DONALD C. MEANY;  
ASSEMBLYMAN PATRICK J. NOLAN;  
and A. WELLS PETERSEN,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE;  
GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.;  
GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H.  
COSTANZO; GEORGE W. COUCH, III; BURKE M.  
CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN;  
RUTH CHURCH GUPTA; DALE E. HANST; LEONARD  
HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP  
SCHAFFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN;  
JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

RONALD A. ZUMBRUN

JOHN H. FINDLEY

\*ANTHONY T. CASO

\*Counsel of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive,

Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

*Attorneys for Petitioners*

## QUESTIONS PRESENTED

1. Is the First Amendment to the United States Constitution implicated by a state law that compels all attorneys to belong and pay annual dues to a state bar association (a public corporation) where state law also grants the bar broad discretion to engage in political and ideological activities, unrelated to regulation of the legal profession, with which its members may disagree?

2. Does a state law requirement that an attorney belong and pay dues to a state bar association violate the attorney's First Amendment rights of speech and association where the compelled fees and association are used to promote political and ideological activities with which the attorney disagrees such as adopting resolutions in favor of ballot initiatives concerning handgun control and nuclear weapons freeze, lobbying on legislation concerning comparable worth, criminal penalties, and environmental issues, and filing briefs amicus curiae in support of an attack on the constitutionality of California's Victims' Bill of Rights Initiative and supporting prisoners arguing that California prison conditions violated their constitutional rights?

## PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to this action.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING.....	i
TABLE OF AUTHORITIES CITED .....	iii
DECISIONS BELOW.....	2
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE .....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT .....	7
I. THE DECISION IS IN CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS .....	7
II. THE DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER STATE SUPREME COURTS .....	11
III. THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT .....	15
CONCLUSION.....	17

## TABLE OF AUTHORITIES CITED

	Page
CASES	
Abood v. Detroit Board of Education, 431 U.S. 209 (1977) .....	<i>passim</i>
Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982) .....	10
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) .....	8
Ellis v. Brotherhood of Railway, Airline and Steam- ship Clerks, 466 U.S. 435 (1984) .....	11
Falk v. State Bar of Michigan, 342 N.W.2d 504 (Mich. 1983) .....	13
Gibson v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986) ..	8, 12
Hollar v. Government of the Virgin Islands, 857 F.2d 163 (3d Cir. 1988) .....	9
In re Integration of the Bar, 93 N.W.2d 601 (Wis. 1958) .....	15
Lathrop v. Donohue, 367 U.S. 820 (1961) ...	5, 8, 15, 16, 17
Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1989).....	8, 15
On Petition to Amend Rule 2 of the Rules Governing the Bar, 431 A.2d 521 (D.C. 1981) .....	15
Petition of Chapman, 509 A.2d 753 (N.H. 1986).....	11, 12
Petition of Moody, 524 P.2d 1261 (Alaska 1974).....	15
Report of the Committee to Review the State Bar, 334 N.W.2d 544 (Wis. 1983) .....	15
Reynolds v. State Bar of Montana, 660 P.2d 581 (Mont. 1983) .....	15



## TABLE OF AUTHORITIES CITED - Continued

	Page
Romany v. Colegio de Abogados de Puerto Rico, 742 F.2d 32 (1st Cir. 1984).....	8, 9
Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D.P.R. 1988).....	9
The Florida Bar, 439 So. 2d 213 (Fla. 1983).....	12
STATUTES	
California Business and Professions Code § 6000, et seq.....	2
§ 6002.....	3
§ 6126.....	3
§ 6143.....	3
28 U.S.C. § 1257(a) .....	2
RULES AND REGULATIONS	
Supreme Court Rule 17(b).....	7
Rule 17(c).....	7
CALIFORNIA CONSTITUTION	
Article VI, § 9.....	2
- UNITED STATES CONSTITUTION	
First Amendment.....	<i>passim</i>
Fourteenth Amendment.....	2
MISCELLANEOUS	
The California Regulatory Law Reporter, Vol. 9, No. 1 (Winter 1989) .....	15

No. \_\_\_\_\_

In The

## Supreme Court of the United States

October Term, 1988

EDDIE KELLER; RAYMOND BROSTERHOUS;  
DAN M. KINTER; DAVID LAMPE; GARRETT  
BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A.  
GRODNIER; CHRISTOPHER N. HEARD; LEONARD C.  
HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST;  
DAROLD D. PIEPER; THOMAS HUNTER RUSSELL;  
NANCY L. SWEET; MICHAEL J. WEINBERGER;  
DAVID E. WHITTINGTON; THOMAS R. YANGER;  
WARD A. CAMPBELL; DONALD C. MEANY;  
ASSEMBLYMAN PATRICK J. NOLAN;  
and A. WELLS PETERSEN,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE;  
GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.;  
GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H.  
COSTANZO; GEORGE W. COUCH, III; BURKE M.  
CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN;  
RUTH CHURCH GUPTA; DALE E. HANST; LEONARD  
HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP  
SCHAFFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN;  
JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

## DECISIONS BELOW

The decision of the California Supreme Court is reported at 47 Cal. 3d 1152, 767 P.2d 1020 (1989), and is reproduced as Appendix A (App.). Page references are to the version in the appendix. The decision of the California Court of Appeal is reproduced as Appendix B.

---

## JURISDICTION

The decision of the California Supreme Court, review of which is sought in this petition, was entered on February 23, 1989, and was filed that same day. No petition for rehearing was sought. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The California constitutional provision at issue is Article VI, Section 9. Statutory provisions at issue are the provisions of California's State Bar Act, codified at California Business and Professions Code § 6000, *et seq.* The full text of the relevant provisions of the act and the above-mentioned constitutional provisions are set out in Appendix D.

---

## STATEMENT OF THE CASE

This is an action by 21 attorneys, licensed to practice law in California, to halt the use of their compelled fees and association for political and ideological activities with which they disagree.

To practice law in California courts, an individual must both belong and pay annual dues to the State Bar of California (Bar). Cal. Bus. & Prof. Code §§ 6002, 6143 (the relevant provisions of the California Business and Professions Code are reproduced in Appendix D commencing at Page D-3). Practicing law without meeting these preconditions is a criminal violation. Cal. Bus. & Prof. Code § 6126. App. at D-27. Far from limiting its activities to the regulation of the practice of law, petitioners established that the State Bar uses the compelled dues moneys and the mandatory association to promote a political and ideological agenda with which petitioners disagree. The undisputed facts presented by petitioners established the nature and scope of the Bar's political activities.

In 1982, when this action was filed, the Bar's Conference of Delegates had taken a position on ballot measures concerning a nuclear weapons freeze and handgun control. App. at E-12. The Bar also filed briefs *amicus curiae* attacking the constitutionality of the Victims' Bill of Rights Initiative and the conditions in California prisons. App. at E-11. The Bar lobbied the California Legislature on numerous issues taking positions on bills concerning such diverse topics as comparable worth, drug paraphernalia, criminal penalties, workfare, legislative veto, inmate labor, vehicle smog inspections, armor piercing

bullets, campaign contributions, and employment of foreign nationals, to name but a few. App. at E-8-E-11.

Petitioners' complaint sought a declaration that the Bar's advancement of a political and ideological agenda with compelled dues and association violated petitioners' First Amendment rights. App. at E-5. Petitioners also sought an injunction against all political and ideological activity by the Bar since the Bar was not a "voluntary" association. App. at E-6.<sup>1</sup>

The trial court granted the Bar's motion for summary judgment ruling that the Bar was a governmental agency and thus restricted in its activities only by the authorizing legislation. App. at C-2. The California Court of Appeal for the Third Appellate District reversed that judgment. That court ruled that the Bar had a dual character, resembling both a governmental agency when fulfilling its regulatory functions, and resembling a labor association when acting pursuant to statutory authority to promote the "science of jurisprudence" or advance the improvement of the "administration of justice." App. at B-23-B-24. The Court of Appeal defined jurisprudence as "[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations" and

<sup>1</sup> Petitioners' complaint also contained a claim relating to the Bar's participation in an election campaign and a request that the individual members of the Board of Governors be required personally to reimburse the Bar treasury for any misspent funds. Both of these claims were finally adjudicated by the California Supreme Court on state law grounds and are thus not raised in this petition.

defined "administration of justice" as relating to the "adjudication or adjustment of rights and duties in a legal system . . . how a legal system is managed and conducted." App. at B-38 n.13. The court ruled that when the Bar was acting pursuant to such goals that it was fulfilling a compelling governmental interest sufficient to overcome petitioners' First Amendment rights. App. at B-3. If petitioners could show, however, that even acting pursuant to those interests the Bar's activity caused some First Amendment injury beyond the compelled association, the Court of Appeal held that the Bar would have to demonstrate some additional compelling governmental interest that would justify the further injury. *Id.* The court also held that political and ideological activity that was not germane to those limited interests could not be financed with petitioners' compelled dues payments. *Id.*

The California Supreme Court reversed the decision of the Court of Appeal and rejected petitioners' First Amendment challenge to the State Bar's expenditure of mandatory dues revenues. The court held that the Bar was a governmental agency and as such was not bound by the precedent of this Court concerning compelled dues payments in the labor union context. *E.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *cf. Lathrop v. Donohue*, 367 U.S. 820 (1961). App. at A-3. Under the California high court's ruling, the only restriction on State Bar activities was that the challenged activity be within the Bar's statutory authority to promote the "science of jurisprudence" or improve the "administration of justice." App. at A-24. The court refused to define these terms, but instead noted:



"In the context of lobbying and amicus curiae activities, this language should be read broadly. Laws are the business of lawyers. . . . Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal." *Id.*

The California Supreme Court then ruled:

"Accordingly, we conclude the bar may use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation." App. at A-3.

Finally, the court held that the Bar's authority to act for improvement of "the science of jurisprudence" and the "administration of justice" was so broad as to encompass all of the challenged activity. In the court's view, the entire question was one of statutory interpretation:

"The Legislature is well aware of the bar's activities, and that the bar's authority for those activities derives from [California Business and Professions Code] section 6031 [authorizing the bar to "advance the science of jurisprudence" and "improve the administration of justice"]. Knowing these matters, the Legislature has annually approved bar dues, some of which go to support lobbying and amicus curiae briefs, and has amended section 6031 to prohibit one specific activity – the rating of appellate judges. We infer that the Legislature essentially approves a broad construction of the statute which would permit the bar's existing activities." App. at A-25.

The court thus found all of the challenged lobbying, amicus activity, and conference resolutions to be within the statutory power of the Bar.

The federal issues on which review is sought in this Court were first raised in the complaint (App. at E-5), and

were subsequently raised at each stage of the proceedings (App. at F-9). The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition – the First Amendment to the United States Constitution. App. at A-10.

---

## REASONS FOR GRANTING THE WRIT

Supreme Court Rule 17(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a Federal Court of Appeals. Rule 17(c) includes as a ground for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. All three of these grounds for review are present in this case.

## I

### THE DECISION IS IN CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS

In rejecting the analysis employed by this Court in the *Abood* decision, the California Supreme Court created a direct conflict between itself and at least three United States Circuit Courts of Appeals.<sup>2</sup> The clearest example of

---

<sup>2</sup> Petitioners are informed that a petition for writ of certiorari to review the decision of the Seventh Circuit Court of Appeals

(Continued on following page)

this conflict is found in the case of *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986). In that case, the Eleventh Circuit cited with approval the California Court of Appeal decision in this case that was ultimately reversed by the California Supreme Court. 798 F.2d at 1569.

In *Gibson*, the plaintiff alleged that lobbying activities by the Florida Bar violated his rights to freedom of speech and association under the First Amendment. After reviewing the decisions of this Court in *Lathrop* and *Abood*, the Eleventh Circuit concluded that the analysis employed in *Abood* must also be used in determining whether First Amendment rights are violated when a state bar association finances ideological activities with compulsory dues assessments. *Id.* In line with this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Eleventh Circuit ruled that the challenged activities of the Florida Bar must be tested pursuant to the compelling state interest/least drastic means test. *Gibson*, 798 F.2d at 1569. The court remanded the case to the District Court for further factual development and noted that the bar would bear the burden of proving that its expenditures were constitutionally justified. *Id.*

Another decision in conflict with the ruling of the California Supreme Court is *Romany v. Colegio de Abogados*

---

(Continued from previous page)

in *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1989), is also currently pending before this Court. The issues raised in that case, while not precisely the same as those in the instant action, also concern the appropriate mode of First Amendment analysis in considering challenges to compulsory state bar associations.

*de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984). In *Romany*, the First Circuit reviewed the decision of the District Court for the District of Puerto Rico that found unconstitutional the statutes providing for the creation of the Colegio (the integrated bar association of Puerto Rico) and its financing through compelled dues and the sale of "forensic stamps" which must be affixed to the initial document that any lawyer files in a Puerto Rican court. *Id.* at 34. The court held that the District Court should have abstained until the Puerto Rico Supreme Court had a chance to offer a remedy. *Id.* at 40. The court did, however, rely on this Court's decision in *Abood* to describe the First Amendment rights at stake in the controversy. The court also noted that because of the importance of those rights, the dissident members of the bar were entitled to interim relief pending a decision of the Puerto Rico court. *Id.* at 44.<sup>3</sup>

The most recent federal appeals court decision to apply the *Abood* analysis to a challenge to an integrated bar association is *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988). In that case, the Third Circuit considered a broad ranging attack on various aspects of the Virgin Islands Bar Association, including that bar's "taking a public position regarding a potential United States attorney." *Id.* at 170. To analyze this claim, the Third Circuit turned to this Court's decision in *Abood*. *Id.*

---

<sup>3</sup> After allowing the Puerto Rico courts an opportunity to provide a remedy, the District Court again found that the Colegio's ideological activity was so pervasive as to make compelled membership in the organization unconstitutional. *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988).



The Court ruled that an integrated bar could expend compelled dues assessments to express opinions so long as the causes sought to be advanced were "germane to the purpose underlying its integration, i.e., the furtherance of the administration of justice." *Id.*

The California decision also conflicts with an earlier Federal District Court decision that was not appealed. In *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982), the District Court applied this Court's decision in *Abood* to strike down a lobbying program instituted by the New Mexico State Bar. *Id.* at 461. The court in *Arrow* rejected the New Mexico bar's proffered interest of informing the state legislature of the views of the bar on issues "which may reasonably be expected to promote the administration of justice or improvement of the legal system." *Id.* at 462. Such a standard, according to the court, would have created an "all-encompassing exception to the rule of *Abood*." *Id.*

The decision of the California Supreme Court in this case presents a clear conflict with these decisions of the United States Circuit Courts of Appeals. Although the decisions cited above may vary as to their conclusion on the application of the law to specific facts, they are in complete agreement as to the law to be applied. Each of the decisions cited above looked to this Court's line of decisions beginning with *Abood* to determine the nature of the rights at stake and the analysis for adjudicating claims regarding those rights. The California Supreme Court departs from this line of cases by refusing even to recognize the existence of a First Amendment question. The conflict presented between the California Supreme Court and the circuits is direct and concrete. This Court should grant certiorari to settle this conflict.

## II

### THE DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER STATE SUPREME COURTS

In addition to the federal cases cited above, a number of other state supreme courts have also reviewed this issue and come to a conclusion in direct conflict with that of the California Supreme Court. In *Petition of Chapman*, 509 A.2d 753 (N.H. 1986), the New Hampshire Supreme Court considered a challenge to lobbying activity of the New Hampshire State Bar Association. The court there recognized:

"The constitutional claim that the petitioner raises is a serious one. It involves the delicate balance between the free speech rights of an individual and those of an organization of which he is required to be a member. As such, he has only limited input into legislative positions taken by the Association. Nonetheless, whatever his level of influence within the organization, the most extreme form of protest, withdrawal, is not open to him." *Id.* at 757-58 (citation omitted).

After tracing this Court's decisions in *Abood* and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), the New Hampshire court concluded that it could best protect the First Amendment rights of bar members through its own continuing supervision over bar activities:

"[W]e have a greater freedom and a greater responsibility in the case before us because of our authority to regulate the legal profession. In interpreting language in the Association's constitution describing its purposes, we can craft a standard which will at once



recognize the negative first amendment rights of dissenting Association members and achieve consistency with the Association's core responsibilities." *Chapman*, 509 A.2d at 758.

The New Hampshire court thus concluded that the First Amendment to the United States Constitution was implicated by mandatory membership and compelled dues requirements of an integrated bar association.

The Florida Supreme Court has also reviewed this issue. Although the Eleventh Circuit in *Gibson* disputed the end result of the Florida court's analysis, the Florida court did recognize the application of the First Amendment to the activities of the Florida Bar. In *The Florida Bar*, 439 So. 2d 213 (Fla. 1983), the Florida Supreme Court considered and rejected a petition to amend the Integration Rule of the Florida Bar to prohibit the bar from engaging in political activity. The Florida court recognized that compelling membership in and dues payments to the state bar had an impact on bar members' First Amendment rights. *Id.* at 213. To overcome that impact, the Florida court noted that the state needed to establish a compelling state interest. *Id.* The court specifically cited this Court's decision in *Abood* in ruling that the challenged activity must be "germane" to the compelling interest. *Id.*

The most complex and confusing decision on a First Amendment challenge to a state bar's activities was issued by the Supreme Court of Michigan. In two separate decisions, that court split two-two-three. Though unable to agree on a conclusion, a solid majority of the court did agree that the First Amendment was implicated

by mandatory membership in and compelled dues payments to an integrated bar association. In its ultimate decision in *Falk v. State Bar of Michigan*, 342 N.W.2d 504 (Mich. 1983), the court denied the plaintiff's motion to be relieved from paying for certain bar association activities, but the court did appoint a committee to review the activities of the bar and to report back to the court with recommendations. *Id.* at 504.

Three members of the Michigan court, relying on this Court's decision in *Abood*, decided:

" 'The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected.' " *Falk*, 342 N.W.2d at 515-16 (opinion of Ryan, J.).

Two other members of the Michigan court, also relying on this Court's decision in *Abood*, agreed that compulsory association and dues payments do implicate First Amendment interests. *Id.* at 508-09 (opinion of Boyle, J.). They disagreed with the plurality, however, over application of what they termed "strict scrutiny." *Id.* at 509. Instead, they thought that the appropriate analysis was to balance "the severity of the injury to the individual interest against the magnitude of the government interest sought to be served." *Id.* The remaining two justices thought that the action should be dismissed on procedural grounds. *Id.* at 514-15 (opinion of Kavanagh, J.). Those two justices did not, however, indicate any dispute

with the concept that there was a First Amendment issue present in the action.

The California Supreme Court acknowledged these state and federal decisions but attempted to distinguish them:

"None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation. Consequently, while we are uncertain whether the courts have correctly described the bar associations at issue in the cited cases we remain confident that the California State Bar is best described as analogous to a governmental agency." App. at A-19-20 (footnotes omitted).

Certainly it cannot seriously be argued that state supreme courts that were the genesis of the integrated bar associations erred in describing the nature of those associations in the cited cases. Similarly, there exists no distinction of constitutional significance as to which coequal branch of state government establishes the integrated bar or provides for the continued collection of compulsory dues. It simply makes no difference whether the state bar is formed by a legislature or a court. In either case the First Amendment analysis must be the same. There are no distinctions between the California State Bar and the integrated bar associations analyzed in the decisions cited above. The decision of the California Supreme Court stands in direct conflict with those decisions and this Court should grant review to resolve that conflict.

### III

#### THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. At a minimum, the outcome of this case impacts on the entire mandatory membership of the State Bar of California – a group that now numbers in excess of 110,000. *The California Regulatory Law Reporter*, Vol. 9, No. 1 at 107 (Winter 1989). Further, at least one-half of the states have chosen to regulate the legal profession through an integrated bar association. *In re Integration of the Bar*, 93 N.W.2d 601, 603 (Wis. 1958); see *Petition of Moody*, 524 P.2d 1261, 1266 (Alaska 1974). Another measure of the impact of this case is the amount of litigation that has already taken place on this issue. In addition to the cases cited above, this issue has been before the courts in *Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983); *Report of the Committee to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983); *On Petition to Amend Rule 2 of the Rules Governing the Bar*, 431 A.2d 521 (D.C. 1981); and *Levine v. Heffernan* (petition for writ of certiorari pending).

Perhaps the most significant indicator of the importance of the issues presented in this case is the fact that this Court has, on a prior occasion, indicated a desire to review these legal questions. In *Lathrop v. Donohue*, this Court reviewed a challenge to the requirement of compelled membership in and dues payments to the State Bar of Wisconsin. Far from rejecting the agency fee analogy as did the California Supreme Court, a plurality of this Court specifically looked to its earlier decisions on the agency fee issue in order to determine the similar issues



presented by an integrated bar association: "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees' Dept. v. Hanson*." *Lathrop*, 367 U.S. at 842 (opinion of Brennan, J.). The plurality did not believe that the case was ripe for a determination of the constitutionality of specific bar expenditures, and thus the issue has been left undecided to this day. Certainly, there would have been no ripeness problem had this Court decided, as did the California court below, that there were no First Amendment implications to political and ideological activity by an integrated bar association.

Another possible indication of this Court's views on this issue is found in the *Abood* decision. In analyzing whether compelled dues payments to a teachers union for political or ideological activities violated a dissenting nonmember's First Amendment rights, this Court noted the similarity between that claim and the claim presented in *Lathrop*. *Abood*, 431 U.S. at 233 n.29. Because no majority could be mustered in *Lathrop* on the constitutional issue, this Court in *Abood* noted "*Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional questions here presented." *Id.*

While neither of these cases presents a sufficiently definite position of this Court to support a finding that the California Supreme Court decision conflicts with a determination of this Court, both *Lathrop* and *Abood* indicate that this Court believes the issue presented here to be important enough to justify a grant of review. Both cases also acknowledge that the issue of whether an integrated bar association violates the First Amendment by spending compelled dues on political and ideological

activities has yet to be decided. This case presents the Court with the opportunity to make such a decision. Thus, the Court should grant review to settle an important question of federal constitutional law impacting a significant segment of the population.

---

### CONCLUSION

The conflict presented by the decision of the California Supreme Court is clear and unmistakable. The California court has rejected the decisions of three United States Circuit Courts of Appeals and three other state supreme courts. Departing from a long line of decisions issued by this Court, the California Supreme Court ruled that there were *no* First Amendment implications to a state law requirement of membership in and compelled dues payments to a state bar association. In so holding, the California court upheld the expenditure of compelled dues for a virtually unlimited array of political and ideological activity. So long as the state Legislature continues to approve (or at least not object to) Bar expenditures, there can be no claim that the expenditures are inappropriate.

Review by this Court is necessary to resolve the conflict created by the California Supreme Court's decision in this case. Review is also necessary so that this Court can finally resolve the important question of law left unanswered nearly three decades ago in *Lathrop*. Petitioners respectfully urge this Court to grant this petition



for writ of certiorari and reverse the judgment of the California Supreme Court.

DATED: May, 1989.

Respectfully submitted,

RONALD A. ZUMBRUN

JOHN H. FINDLEY

\*ANTHONY T. CASO

\*Counsel of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive,

Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

*Attorneys for Petitioners*

**APPENDIX VOLUME I**

## APPENDIX A

C O P Y

IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA

EDDIE KELLER et al.,	)	
Plaintiffs and Appellants,	)	
v.	)	S.F.25050
THE STATE BAR OF CALI-	)	(Ct. of Appeal
FORNIA et al.,	)	3 Civ. No. 24124)
Defendants and Respondents.	)	(Super. Ct.
	)	No. 307168)
	)	(Filed FEB 23 1989)

This suit attacks the use of dues collected by the State Bar of California to finance lobbying, amicus curiae briefs and other activities, including election campaign activities, politically or ideologically objectionable to plaintiffs. Upon analysis of the constitutional status and legislative structure of the State Bar, we conclude that the State Bar may use dues to finance any activity, except election campaigning, which is germane to its statutory mission to promote "the improvement of the administration of justice." (Bus. & Prof. Code, § 6031, subd. (a)<sup>1</sup>.)

Acting pursuant to its statutory authority, the State Bar for many years has lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education

<sup>1</sup> Unless otherwise indicated, all California statutory citations are to the Business and Professions Code.

programs. In 1982 the State Bar publicized the inaugural speech by its new president, Anthony Murray, in which he addressed the confirmation of appellate justices in the impending election. The State Bar subsequently disseminated material on that subject to local bar associations and other organizations.

All of these activities were financed primarily from membership dues, as are all bar activities except the bar examination. The State Bar levies membership dues pursuant to statutory authority (§ 6140) subject to a maximum limit set annually by the Legislature. Every attorney engaged in active practice in California is required to be a member of the bar (§§ 6125-6126) and to pay the dues assessed; a refusal to pay results in the suspension of membership (§ 6143), which deprives the attorney of the right to practice law in California (§ 6225).

Plaintiffs contend that the activities in question constitute the advancement of political and ideological causes, and cannot constitutionally be financed from mandatory dues. This is an issue of first impression in this state. Courts of some other jurisdictions have limited the use of bar dues, but there is no consensus concerning those limits.

When we set out to analyze the issue, we are confronted immediately with two competing paradigms. The State Bar argues that we should view it as a government agency, which may use revenues from any source for any purpose within the scope of its authority. Plaintiffs, on the other hand, argue that we should view the bar as a labor union or private association whose right to use dues money is restricted by constitutional principles.

We believe the governmental agency paradigm more closely fits the case of the California State Bar. Accordingly, we conclude the bar may use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation. By analogy to governmental agencies, however, the bar may not engage in election campaigns; thus certain of the activities in connection with the 1982 election exceeded its statutory power.

#### *I. Proceedings In This Action.*

Plaintiffs, 21 members of the State Bar, filed suit against the bar and its Board of Governors. Their complaint alleged that "[t]he State Bar of California, by and through its Board of Governors, has expended and will continue to expend substantial portions of the revenues derived from . . . mandatory dues payments to advance political and ideological causes, including, but not limited to:

"a. lobbying the California State Legislature on various matters . . . ;

"b. submitting briefs amicus curiae in various cases . . . ;

"c. financing meetings of the Conference of Delegates at which political and ideological causes are advanced . . . ;

"d. publicizing the political and ideological speeches of its president, Anthony M. Murray . . . ;



"e. financing a so-called 'public information' project designed to disseminate to the general public a particular ideology regarding judicial retention elections. . . ."

Plaintiffs then alleged that they do not subscribe to many of the political and ideological causes promoted by the bar, and object to the use of mandatory dues to advance any of the political and ideological views of the Board of Governors or the conference of delegates. They sought a declaration that defendants have violated their constitutional rights, an injunction restraining defendants from using bar dues or the name of the State Bar to advance political and ideological causes or beliefs, and an injunction compelling defendants to reimburse the bar for all funds expended for political and ideological purposes since September 12, 1982.

Plaintiffs attached a partial list of the bills which the bar has lobbied for or against, of the cases in which it has appeared as amicus curiae, and of resolutions adopted by the conference of delegates. They also attached a copy of Anthony Murray's inaugural address when he became president of the bar on September 12, 1982, a press release describing that address, and a later press release dated October 8. (Although the complaint referred to "speeches," the September 12 speech is apparently the only one at issue.) Finally, plaintiffs attached a copy of an educational packet entitled "The Case for an Independent Judiciary" distributed by the bar in October of 1982. The packet included a copy of Murray's inaugural address, a resolution of the Board of Governors, a sample speech, fact sheets on crime and conviction rates, judicial retention elections, and judicial performance, and suggestions for speech fora and media coverage.

Defendants answered, admitting that they have used dues to finance all of the described activities, but maintaining that such expenditures did not violate plaintiffs' rights.<sup>2</sup> Defendants then moved for summary judgment or adjudication of issues. In support, they submitted declarations which described the bar's legislative and amicus curiae program and asserted that the bar usually acted only in matters which affect the bar itself, the attorney-client relationship, or the administration of justice. In lobbying or filing amicus curiae briefs the bar's representatives purport to act only on behalf of the State Bar, and not to represent the views of each of its members. Plaintiffs filed a cross-motion for summary judgment, but submitted no declarations.

The trial court granted summary judgment for defendants, finding that the State Bar was a governmental agency authorized to do the acts in question. The court further found that the plaintiffs had failed to show that the individual defendants acted without due care or in bad faith.

The Court of Appeal reversed. The majority opinion by Justice Sparks divided State Bar activities into two categories. The first, regulatory activities, included the testing and admission of bar applicants and the disciplining of members. These activities, the Court of Appeal said, were akin to those of a governmental agency. The bar's administration-of-justice function - a function which included all the activities here challenged - it

<sup>2</sup> Defendant Phyllis Hix answered separately, asserting only the defense of failure to state a cause of action. She is not involved in this appeal.

found akin to the actions of a labor union. Such actions, it held, could be financed from mandatory dues only if the particular action in question served a state interest important enough to overcome the interference with dissenters' First Amendment rights.<sup>3</sup> Each lobbying activity, it said, and each amicus curiae brief, would have to be examined, with the State Bar bearing the burden to justify its action.

The Court of Appeal further held that the Murray speech and educational packet constituted election campaigning unauthorized by statute. It further found that the Board of Governors' approval of such unauthorized expenditures may subject its members to personal liability, and raised a triable issue concerning their good faith and exercise of due care. We granted the defendants' petition for review.

## II. *Structure And Function Of The State Bar.*<sup>4</sup>

Although the parties submitted much documentation in support of and in opposition to the respective motions, there is no real factual dispute about the State Bar and its activities. As we recently recounted, "[i]n 1927, the Legislature adopted the State Bar Act (Bus. & Prof. Code,

<sup>3</sup> Justice Puglia, concurring, maintained that the bar must prove that financing such activities from mandatory dues served a compelling state interest that cannot be achieved by less restrictive means.

<sup>4</sup> The discussion in this section is adapted from the Court of Appeal opinion of Justice Sparks.

§ 6000 et seq.) establishing 'what is known as an "integrated" bar, i.e., an organization of members of the legal profession of the state with a large measure of self-government, performing such functions as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice.' (1 Witkin, Cal. Procedure (1970 ed.) Attorneys, § 157, p. 168.)" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557.)<sup>5</sup> Thus, the State Bar is authorized to establish an examining committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill the requirements. . . ." (§ 6046, subds. (a), (c).) Under the board's auspices, local administrative committees may investigate complaints about the conduct of members and may thereafter forward reports and recommendations to the board for action. (§ 6043, subds. (a), (c).) After a hearing, the board "has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproof, public

<sup>5</sup> "An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments." (Note, First Amendment Proscriptions on the Integrated Bar: *Lathrop v. Donohue Re-Examined* (1980) 22 Ariz. L. Rev. 939, 941, fn. omitted.) It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. (See Winters, *Bar Association Organization and Activities* (1954) p. 1.)



or private, with such recommendation." (§ 6078.) "In those two areas, the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. In the area of admission to practice, an applicant is admitted only by order of the Supreme Court which, upon certification by the bar's examining committee that the applicant fulfills the admission requirements, 'may admit such applicant as an attorney at law in all the courts of this State. . . .'" (*Saleeby, supra*, at p. 557, citations omitted.) In addition to those duties, the State Bar enforces the law relating to the unlawful practice of law and illegal solicitation (§§ 6030, 6125-6131, 6150-6154), administers an arbitration system for fee disputes (§§ 6200-6206), maintains a client security fund (§ 6140.5) and engages in other similar matters relating to the legal profession.

In addition to these powers, the board is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." (§ 6031, subd. (a).)<sup>6</sup> This has been called the "laudable general purpose of the [State Bar] act." (*Herron v. The State Bar* (1931) 212 Cal. 196, 199.) The bar's general counsel has described this provision as "the springboard for State Bar activities."

---

<sup>6</sup> The board is also authorized by that subdivision to aid in "all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

(Hearing on Use of Mandatory State Bar Dues, Assem. Com. on Judiciary (Sept. 17, 1980) letter of Herbert M. Rosenthal, p. 111.) Some of the bar's actions undertaken pursuant to this section have been statutorily delineated; most have not. For example, the State Bar is mandated by statute to cooperate with and give assistance to the Commission on Judicial Performance (Gov. Code, § 68725), to assist the Law Revision Commission (Gov. Code, § 8287), and to evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record. (Gov. Code, § 12011.5.) In aid of all of its powers, the State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes." (§ 6001, subd. (g).)

To carry out its functions, the State Bar is governed by a Board of Governors of 22 members, 16 of whom are members of the State Bar and 6 of whom are nonattorneys appointed by the Governor of the state with approval of the Senate. (§§ 6010, 6011, 6013.5.) Fifteen of the attorney members of the board are elected by the members of the State Bar from geographical areas established by the Legislature, and one member is elected by the board of directors of the California Young Lawyers Association. (§§ 6012, 6013, 6013.4.) The board elects the officers of the State Bar. (§§ 6021-6024.) The State Bar has established a conference of delegates, which consists of representatives of voluntary local and special bar associations. The conference meets once a year to consider proposals, many of which are intended for legislative action. The board has also established committees or sections open to members of the bar interested in particular areas of the law and which advise the board in those areas.



The bar employs attorneys who represent it in disciplinary actions and other litigation, including the present case. On direction of the Board of Governors, the attorneys file briefs amicus curiae in litigation affecting the bar or its members. The bar also employs lobbyists to present the position of the board to the Legislature and state agencies.

III. *The State Bar, For The Purpose Of Expenditure Of Dues, Is Analogous To A Governmental Agency.*

The issue we face today came before the United States Supreme Court in *Lathrop v. Donohue* (1961) 367 U.S. 820. Plaintiffs in that case challenged the constitutionality of the Wisconsin integrated bar. Relying on cases upholding the constitutionality of legislation authorizing the union shop (*International Association of Machinists v. Street* (1961) 367 U.S. 740; *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225), all justices agreed that compulsory membership in the bar was constitutional. (See *Levine v. Heffernon* (7th Cir. 1988) \_\_ F.2d \_\_.) Justice Brennan, writing for four justices, declined to reach questions concerning the use of mandatory dues because the plaintiffs had not objected to any specific expenditure. The remaining five justices agreed that the issue of use of dues was properly before the court, but disagreed on the result. Justice Harlan, joined by Justice Frankfurter, treated the bar association as analogous to a governmental agency and dues as analogous to license fees, and found no constitutional infirmity in the use of dues for authorized purposes. (See *Lathrop, supra*, 367 U.S. at pp. 864-865.) The member, he points out, is not required affirmatively to profess or

assent to any belief, and the bar, in its lobbying activities, did not claim to present the views of all of its members. (See *id.* at pp. 860-861.) Justice Whittaker asserted briefly that practicing law was a special privilege, which could be conditioned on payment of bar dues. Justices Douglas and Black dissented, referring to their opinions in *International Association of Machinists v. Street, supra*, 367 U.S. 740, where they said that the use of union dues to finance political activities violated the members' First Amendment rights. Thus as pointed out in a subsequent case, all *Lathrop* decided was that the constitutional issues concerning use of bar dues should be decided; it did not decide those issues. (*Aboud v. Detroit Board of Education* (1977) 431 U.S. 209, 233 fn. 29.)

Consequently the treatment of bar dues remains an unsettled question. We recognize certain similarities between the bar and a labor union which would support imposing upon the bar those restrictions which limit union expenditures. The bar is an association composed of members of a particular profession. It is governed by a board, the majority of whom are elected by the members. It holds annual meetings. Although much of its activity is done to promote the public interest, it also regularly acts on behalf of the special interest of its members.

The California Constitution, statutes, and judicial decisions, however, appear to envision the bar as a governmental agency. The State Bar Act of 1927, codified in sections 6000-6087, provides in section 6001 that "[t]he State Bar of California is a public corporation." This declaration attained constitutional status with the enactment in 1966 of article VI, section 9 of the state Constitution, which asserts that "[t]he State Bar of California is a

public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record."

What is a "public corporation"? When the State Bar Act was enacted in 1927, this term was defined by a statute, since repealed: a public corporation is one "formed or organized for the government of a portion of the state." (Former Civ. Code, § 284.) Construing that statute, a 1917 decision said that "[P]ublic corporations . . . are those corporations formed for political and governmental purposes and vested with political and governmental powers." (*Bettencourt v. Industrial Acc. Com.* (1917) 175 Cal. 559, 561.)

In *State Bar of California v. Superior Court* (1929) 207 Cal. 323, it was contended that the State Bar could not be a public corporation because it was not created to govern "a portion of the state," and that the State Bar Act was thus an unconstitutional attempt to create a private corporation.<sup>7</sup> The court responded that the statute defining a public corporation could not limit the Legislature from enacting subsequent statutes creating public corporations for purposes other than the government of a portion of the state. It added that the Legislature has

---

<sup>7</sup> The parties and the court appeared to assume that "a portion of the state" meant a geographical portion. One amicus curiae in the present case, however, contends that "portion" can be defined in other ways, and that the State Bar does govern a portion of the state, namely the attorneys of California in the practice of their profession.

frequently created public corporations which did not have the function of governing a portion of the state, citing examples of reclamation districts, levee districts, and irrigation districts.<sup>8</sup>

It was further argued in *State Bar v. Superior Court*, *supra*, 207 Cal. 323 that the State Bar must be considered a private corporation in view of its membership, functions, purpose, and its independence from public regulation and control. The court responded that the regulation of the practice of law is within the police power of the state – a close issue in 1929, but not today – and referred to legislative and judicial regulation as sufficient to classify the bar as a public corporation.

This decision does not answer the question whether a public corporation is necessarily a governmental agency. But it is significant that all other public corporations in California – water districts, school districts, reclamation districts, etc. – are clearly considered governmental entities. Conversely, no labor union or professional association is classified as a public corporation.

Apart from its denomination as a public corporation, other aspects of the bar show its governmental nature. The Board of Governors includes six public members

---

<sup>8</sup> These are districts which perform services for landowners within a geographic area. Although their structures vary (many having been created by special statute), generally they are governed by an elected board. The electors may consist of all residents, or of landowners, and the latter may vote in proportion to the value of their holdings. Such districts generally have the power to levy taxes.

School districts represent another type of nonmunicipal public corporation.



appointed by the Governor, who are not members of the bar. (§ 6013.5.) The presence of "consumer representatives" on state regulatory boards is a common phenomenon, but no law permits the Governor to appoint nonmembers as officers of a labor union or private association. Section 6008 declares that "[a]ll property of the State Bar is hereby declared to be held for essential public and governmental purposes" and is exempt from taxation. Section 6026.5 requires public meetings; a similar requirement applies to governmental regulatory boards but not to unions or private associations. Section 6001, subdivision (g) states that "[n]o law of this State restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies . . . shall be applicable to the State Bar, unless the Legislature expressly so declares" – an unnecessary enactment unless laws governing the exercise of powers of state public bodies or state agencies would otherwise apply to the bar. In *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548 we said that this last provision demonstrates "[t]hat the Legislature considered the State Bar as at least akin to a state public body or agency" (p. 565), and held that officers of the bar could claim the confidential communication privilege given public officers under former Code of Civil Procedure section 1881.<sup>9</sup> A later decision, *Engel v.*

<sup>9</sup> Former Code of Civil Procedure section 1881, subdivision 5, provided that "[a] public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." This statute has been superseded by Evidence Code sections 1040-1042.

*McClosky* (1979) 92 Cal.App.3d 870, applied the tort claims act (Gov. Code, § 810 et seq.) to the State Bar.<sup>10</sup>

A recent amendment to section 6031 further indicates that the Legislature views the bar as a governmental agency. Subdivision (b), added by the amendment, provides that "the board [of governors] shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice [of an appellate court] . . . without prior review and statutory authorization by the Legislature." If the State Bar is considered a private association, the constitutionality of this statute is suspect. It is a content-defined prohibition of a particular form of political speech by a named organization, imposed, apparently, because the Legislature objected to bar attempts to influence the voters. It would be difficult to justify a prohibition on political speech by a private association, especially one enacted because the speaker is thought too knowledgeable and influential with the voters. If the bar is thought of as a governmental agency, on the other hand, section 6031, subdivision (b), merely defines the scope of authority of the agency, and raises no constitutional question.

<sup>10</sup> The tort claims act applies to "public entities," defined as including "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." The Law Revision Commission Comment states that "[t]his definition is intended to include every kind of independent political or governmental entity in the state."



As we noted earlier, the Court of Appeal divided the state bar's function into two parts. It held that in regulating the admission of members to the bar, and disciplining current members, the bar performed a governmental function, but in all other activities it was analogous to a private association. We reject this holding on two grounds. The first is simply that the reason we view the bar as analogous to a governmental agency is not only that it performs a governmental function, but that the state Constitution, statutes, and court decisions treat it as a governmental agency. Those enactments and decisions do not differentiate according to the specific activity performed by the bar. Thus the bar is a public corporation, whether it is disciplining members or filing amicus curiae briefs; it is exempt from taxation and immune from tort liability both when examining applicants for admission and when lobbying the Legislature. Its stature under the California Constitution, its structure, and its government are the same for all its functions. We conclude that however classified, it must be regarded as a single entity.

Second, the Court of Appeal's dichotomy, viewing lobbying and amicus curiae activity as that of a private association, would frustrate the legislative purpose underlying the bar's authority to promote the administration of justice. Under the Court of Appeal's view, whenever the bar proposed to advise the Legislature or the courts of its views on a matter, it would first have to engage in the three-step analysis set out in *Ellis v. Railway Clerks* (1984) 466 U.S. 435. The bar must first determine whether the activity is germane to the purpose for which the bar has compulsory membership. Next, if the activity is germane, it must decide whether it inflicts an

infringement of the dissenters' First Amendment rights beyond that inflicted by compulsory membership alone. Finally, if there is an infringement of First Amendment rights, it must determine whether there is a state interest sufficient to justify that infringement.<sup>11</sup>

Such a procedure would be an extraordinary burden. Hundreds of bills come before each legislative session; cases affecting the administration of justice arise frequently. Bar action, to be effective, must take place before the legislative session ends or the case is submitted. The bar has neither time nor money to undertake a bill-by-bill, case-by-case *Ellis* analysis, nor can it accept the risk

---

<sup>11</sup> Serious conceptual difficulties arise in applying this three-step analysis to the State Bar. The first step asks whether an activity is germane to the purpose of compulsory membership. We know the functions of the State Bar – they are set out in statute – but the concurring and dissenting opinion impliedly suggests that the purpose of compulsory membership may be a more limited one, the delivery of quality legal services and the improvement of the legal profession. (*Post*, p. \_\_\_\_ [typed opn. at p. 26].) It does not explain this distinction.

The second step inquires whether the activity imposes a burden on First Amendment rights additional to that imposed by compulsory membership. The cases, however, do not elucidate which uses of dues impose burdens subsumed in compulsory membership, and which impose additional burdens.

The last step examines whether there is a state interest sufficient to justify the additional burden on objectors' rights. We have no guidance on what interest will meet this criterion: the Michigan Supreme Court, which considered this matter twice, was unable to reach agreement. (*Falk v. State Bar of Michigan* (1981) 305 N.W.2d 201 [Falk I]; *Falk v. State Bar of Michigan* (1983) 342 N.W.2d 504 [Falk II], cert. denied (1984) 469 U.S. 925.)

of litigation every time it decides to lobby a bill or brief a case.<sup>12</sup> Thus the likely result of the Court of Appeal's approach would be to deter the bar from conducting *any* lobbying or filing *any* amicus curiae briefs. If those activities promote the administration of justice by providing the Legislature and the courts with expert legal assistance, as we believe, an approach which would deter all lobbying and amicus curiae activity would frustrate the state interest underlying the establishment of an integrated bar.

Furthermore, the one area where the Legislature has indicated displeasure with the bar's activity concerns election campaigning. Yet if the bar is viewed as a private association, it would have a constitutional right to participate fully in political campaigns. (See *Abood v. Detroit Board of Education*, *supra*, (1977) 431 U.S. 209, 235-236; cf. *Buckley v. Valeo* (1976) 424 U.S. 1.) No explicit authorization would be necessary; any prohibition on such activity, such as section 6031, subdivision (b), would be unconstitutional.<sup>13</sup> Again, such a result would seem inconsistent with legislative intent.

<sup>12</sup> The situation is not analogous to a labor union, which serves a much more limited function and constituency. The function of the bar is not limited to promoting the self-interest of its members, but extends to promoting the improved administration of justice. Thus the bar is properly concerned with legislation other than just that which affect the earnings and working conditions of attorneys.

<sup>13</sup> The bar as a private association would be subject to limitations on what election activities it could finance from dues. (Cf. *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435.) But actions which do not require expenditure of money, such as the endorsement of candidates, could not be challenged.

We recognize that most of the cases from other jurisdictions which have addressed the subject of integrated bar dues have applied the labor union analogy to the bar. (*Gibson v. The Florida Bar* (11th Cir. 1986) 798 F.2d 1564; *Schneider v. Colegio de Abogados de Puerto Rico* (D.P.R. 1983) 565 F.Supp. 963, *revd in part in Romany v. Colegio de Abogados de P.R.* (1st Cir. 1984) 742 F.2d 32, on remand *Schneider v. Colegio de Abogados de Puerto Rico* (D.P.R. 1988) \_\_\_ F.Supp. \_\_\_; *Arrow v. Dow* (D.N.M. 1982) 544 F.Supp. 458 [New Mexico Bar]; *The Florida bar* (Fla. 1983) 439 So.2d 213; *Falk I*, *supra*, 305 N.W.2d 201; *Falk II*, *supra*, 342 N.W.2d 504; *Reynolds v. State Bar of Montana* (1983) 660 P.2d 581.)<sup>14</sup> None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation. Consequently, while we are uncertain whether the courts have correctly described the

<sup>14</sup> The one exception is *Sams v. Olah* (1969) 225 Ga. 497. The Georgia Supreme Court rejected a contention that the integrated bar of Georgia was unconstitutional because it spent funds for political purposes. Declaring that the bar was not a labor union (p. 506), the court concluded that the only issue was whether the fees were spent for the purposes for which the bar was created. (P. 507.) "The promotion of political issues and candidates is not within the purposes of the State Bar. . . . The fostering of legislation and the promotion of ideologies may, or may not, be consonant with the purposes of the State Bar, according to the nature of the legislation and the ideologies." (P. 508.)



bar associations at issue in the cited cases<sup>15</sup> we remain confident that the California State Bar is best described as analogous to a governmental agency.<sup>16</sup>

---

<sup>15</sup> Only one of these cases gives any reason for applying the labor union paradigm to an integrated bar instead of viewing it as a governmental agency. *Gibson v. The Florida Bar*, *supra*, 789 F.2d 1564, 1568, quoted Justice Powell's concurring opinion in *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209, 259, footnote 13, where he said that " 'the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.' " (789 F.2d at p. 1568, quoting *Abood v. Detroit Board of Education*, *supra* 431 U.S. 209, 259, fn. 13.)

We find the argument unpersuasive. A city government is representative of a segment of the state's population which, by reason of geography, shares common interests; a bar association is representative of a segment which, by reason of career, shares common interests. Each, we think, is a governmental agency, which to fulfill its statutory function must be able to spend money on controversial matters.

<sup>16</sup> In *Lathrop v. Donohue*, *supra*, 367 U.S. 820, 864-865, Justice Harlan, supporting the use of dues to finance lobbying by the Wisconsin bar, wrote: "I had supposed it beyond doubt that a state legislature could set up a staff or commission to recommend changes in the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel. . . . It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer. . . . In this circumstance, wherein lies the unconstitutionality of what Wisconsin has done? Does the Constitution forbid the payment of some part of the Constitutional

(Continued on following page)

#### IV. *The Consequences Of Viewing The State Bar As A Governmental Agency.*

If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority.

Two Court of Appeal decisions illustrate the point. In *Erzinger v. Regents of University of California* (1982) 137 Cal.App.3d 389, certiorari denied, 462 U.S. 1133, students at the University of California objected that the compulsory student registration fees included a fee for health services which included abortions. The Court of Appeal, noting that the Board of Regents is a governmental agency, treated the fee as equivalent to a tax, and held that one could not refuse to pay a tax because of ideological or religious objections to the use of the money.

---

(Continued from previous page)

license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things? [¶] I end as I began. It is exceedingly regrettable that such specious contentions . . . should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality."



In *Miller v. California Com. on Status of Women* (1984) 151 Cal.App.3d 693, appeal dismissed, 469 U.S. 806, plaintiffs attacked the commission's expenditures incurred in lobbying for the enactment of the equal rights amendment. The Legislature responded by enacting Government Code section 8246, which expressly authorized such lobbying.<sup>17</sup> The Court of Appeal found the statute controlling. Rejecting the claim that commission lobbying infringed the rights of dissenters, it wrote that the claim failed to distinguish between the government's addition of its own voice and its silencing of others. "That government must regulate expressive activity with an even hand if it regulates such activity at all does not mean that government must be ideologically 'neutral.'" (P. 700, quoting Tribe, *American Constitutional Law* (1978) p. 588.) Government may not compel citizens to express a particular viewpoint, nor delegate to nongovernmental entities the power to extract funds to support political and ideological activity not directly related to the entity's purpose. *Ibid.*, citing *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209.) "But none of this means that government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication." (*Ibid.*, quoting Tribe, *op. cit. supra*, p. 590.) "If the government . . . cannot appoint a commission to speak on the topic [of the status

---

<sup>17</sup> Section 8246 provides in subdivision (a) that "the commission is expressly authorized to inform the Legislature of its position on any legislative proposal pending before the Legislature and to urge the introduction of legislative proposals."

of women] without implicating plaintiffs' First Amendment rights it may not address any other 'controversial' topics. If the government cannot address controversial topics it cannot govern." (P. 701.)<sup>18</sup>

We conclude that the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority. The concurring and dissenting opinion disputes this conclusion, arguing that even if the bar is a governmental agency its use of dues should be subject to restrictions hitherto imposed only on labor unions and other private associations. But no precedent supports the imposition of such restrictions on a governmental agency. Moreover, as we have previously explained (*ante*, p. \_\_\_ [typed opn. at p. 20]), applying the labor union test to the bar would impose upon the bar the massive burden of analyzing all proposed activities under vague and uncertain standards designed for organizations of quite different purpose and structure, and would probably discourage the bar from carrying out its statutory functions.<sup>19</sup>

---

<sup>18</sup> Other cases approving lobbying by governmental agencies include *Stanson v. Mott* (1976) 17 Cal. 3d 206, 218; *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318; *Powell v. City & County of S.F.* (1944) 62 Cal.App. 2d 291.

<sup>19</sup> Under the concurring and dissenting opinion, the State Bar would have the worst of both the private and the governmental worlds. It would be subject to constitutional restrictions on its use of dues, as are private associations, but would not enjoy the constitutional rights of private associations to endorse candidates and engage in political campaigns.

Having decided that the bar may use dues for any authorized purpose, we next inquire into the scope of its authority. As previously noted, section 6031, subdivision (a) authorizes the bar to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." In the context of lobbying and amicus curiae activities, this language should be read broadly. Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems." (*Falk I, supra*, 305 N.W. 201, 231-232 (opn. of Williams, J.) fns. omitted)<sup>20</sup>

<sup>20</sup> The same reasoning applies to lobbying before administrative agencies, and to the filing of amicus curiae briefs. Agencies and courts, in their interpretation of laws, also benefit from the collective advice of the bar.

Thus we do not distinguish between proposed legislation of substantive character and that which aims only at procedural changes. Substantive legislation has procedural effects, as, for example, when a change in tort law affects the number of cases settled and the number going to trial. And even if the proposed bill seems at first glance to relate entirely to substantive matters unrelated to the practice of law, the advice of expert practitioners could still be crucial; an example might be a bill concerning community property which has consequences, unforeseen by its author, upon estate planning or federal tax liability.

We conclude that a bill-by-bill, case-by-case, review of bar lobbying and amicus curiae briefs is unnecessary and unworkable. We do not impose such scrutiny on lobbying and litigating by other governmental agencies. The Legislature is well aware of the bar's activities, and that the bar's authority for those activities derives from section 6031. Knowing these matters, the Legislature has annually approved bar dues, some of which go to support lobbying and amicus curiae briefs, and has amended section 6031 to prohibit one specific activity – the rating of appellate judges. We infer that the Legislature essentially approves a broad construction of the statute which would permit the bar's existing activities.

Holding a conference of delegates also falls within the bar's authority. (Cf. *Ellis v. Railway Clerks, supra*, 466 U.S. 435, 448, 455-456 (union conventions).) Plaintiffs, however, assert that some of the resolutions debated and passed by the conference fall beyond the boundary. The examples they cite, however, do not support this assertion; all but one relate to proposed changes in California



law and that one relates to federal court jurisdiction, a subject which affects the practice of law in California.

The bar's actions in connection with the 1982 election present a different issue. We have no doubt that the bar's actions related to the administration of justice. Indeed few matters bear as directly upon the administration of justice as the standards for the appointment and retention of judges. In *Stanson v. Mott*, *supra*, 17 Cal.3d 206, however, we set out a special rule limiting state agency participation in election campaigns. We there stated that absent "clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign." (17 Cal.3d at pp. 209-210.) Informational or education expenditures, on the other hand, require no such explicit authorization, for an agency has "implicit power to make 'reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment. . . .'" (P. 220, quoting *Citizens to Protect Pub. Funds v. Board of Education* (N.J. 1953) 98 A.2d 673, 676.)

We recognized that "[f]requently . . . the line between unauthorized campaign expenditures and authorized informational activities is not so clear. . . . In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." (P. 222, fn. omitted.)

The present case is one of those we anticipated in *Stanson v. Mott*, *supra*, 17 Cal.3d 206. Anthony Murray's inaugural speech was delivered about three months

before the 1982 election, and clearly referred to that election. (The speech itself, of course, cost the State Bar nothing; the issue concerns its being publicized through press release and educational materials.) Some of its language is quite strident; he denounces the "idiotic cries of . . . self-appointed vigilantes . . . [and] unscrupulous politicians." Some portions of the speech are restrained and educational in tone: he describes the history of the concept of judicial independence from the failed impeachment of Justice Samuel Chase to the present day and the role and philosophy of the bar,<sup>21</sup> and presents statistics concerning this court's review of criminal cases. The speech did not mention any justice by name, or urge the retention of any or all of the justices.<sup>22</sup> The bar's subsequent press release simply describes the speech, highlighting Murray's assertion that "the only legitimate basis for refusing to retain or for recalling a justice is a showing of incapacity or misconduct in office."

<sup>21</sup> Murray asserts a proposition which counsel for the State Bar have not chosen to argue here - that it is the proper role and indeed duty of the bar to defend the judiciary from unjustified attack because judges are inhibited from election campaigning themselves. Amici curiae adopt the argument and refers us to the American Bar Association Code of Professional Responsibility, Ethical Consideration, EC 8-6, which states that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."

<sup>22</sup> As *Stanson*, *supra*, 17 Cal.3d 206, explains, it is not essential that the publication expressly exhort the voters to vote one way or another. *Stanson* notes:

(Continued on following page)



The educational packet, sent to local bar associations and other interested groups, contained Murray's speech, a sample speech entitled "The Case for an Independent Judiciary" (a quite restrained and philosophical exposition), sample letters to organizations which might provide a speech forum, and a sample press release. It also included fact sheets on crime and conviction rates, judicial selection and retention, and judicial performance and removal criteria. It concluded with quotations concerning

---

(Continued from previous page)

"In 35 Ops.Cal.Atty.Gen. 112 (1960), for example, the trustees of the Madera Union High School District placed a full page advertisement in a general circulation newspaper one day before a school bond election. The advertisement did not explicitly urge voters to 'Vote Yes' on the bond issue, but stated in large letters that 'A CLASSROOM EMERGENCY EXISTS NOW AT MADERA UNION HIGH SCHOOL' and listed a number of reasons why additional funds were needed by the school district. The county counsel requested the Attorney General's opinion as to whether public funds could be used to pay for the advertisement.

"After reviewing the relevant judicial authorities, the Attorney General concluded that although the advertisement did not explicitly urge a 'Yes' vote and did disclose relevant factual information, the use of public funds to pay for the advertisement would nonetheless be improper. The opinion reasoned: 'Viewed as a whole, the advertisement cannot properly be held to be a publication primarily designed to educate the voters as to the activities carried on by or the conditions of the Schools of the district. . . . The style, tenor and timing of the advertisement placed by the board of trustees points plainly to the conclusion that the publication was designed primarily for the purpose of influencing the voters at the forthcoming school bond election.' (35 Ops. Cal.Atty.Gen. 112,114.)" (17 Cal.3d at p. 222, fn. 8.)

judicial independence from Hamilton, Madison, Jefferson, and others.<sup>23</sup>

The bar may properly act to promote the independence of the judiciary; such conduct falls clearly within its statutory charge to advance the science of jurisprudence and improve the administration of justice. In the present case, however, the nature and timing of the 1982 publication (see *Stanson v. Mott*, *supra*, 17 Cal.3d 206, 222), indicate that it is a form of prohibited election campaigning. The material was distributed approximately one month before an election in which six justices of this court came before the voters for confirmation. It is the kind of material which a state election committee distributes to local committees to aid them in the campaign. Its style and tenor is appropriate to that end; it is basically informative and factual, but without claim of impartiality, and includes such practical tools as a form letter to groups which might host a speaker. While intended to educate the reader because its authors believed an informed campaigner would be a more effective campaigner, its primary purpose, we believe, was to assist in the election campaign on behalf of the justices.

---

<sup>23</sup> In distributing these materials, the bar acted pursuant to a unanimous resolution of the Board of Governors declaring "that it is the duty of the legal profession and all of its members to . . . [t]ake steps to maintain and promote understanding and confidence, among the citizens of this state and the nation, in the need for an independent judiciary. . . ." The resolution further declared "that the State Bar should take necessary and appropriate steps to support these principles and to aid the profession and the public in understanding them."

We conclude that in preparing and distributing this material, the State Bar exceeded its statutory authority.

In view of the absence of any prior authority in California construing section 6031, and the obvious difficulty of the issue, we cannot fairly hold the governors personally liable for the 1982 expenditures. The bar has long been concerned with promoting and defending the independence of the judiciary. It formally endorsed the initiative which established the present system of judicial retention elections in place of partisan elections.<sup>24</sup> It has frequently debated and proposed measures for merit selection and life tenure for judges. As we noted earlier, it is charged with an ethical obligation to defend the judiciary from unfair attack. (See fn. 22, *ante*.) Under these circumstances, we conclude as a matter of law that the Board of Governors could reasonably believe that it had the authority to take action in opposition to what it perceived to be an attack on an independent judiciary. Under *Stanson v. Mott*, *supra*, 17 Cal.3d 206, 226-227, such a reasonable belief precludes personal liability.

#### V. Conclusion.

In light of the structure of the California State Bar, as imposed in the state Constitution, statutes, and court

<sup>24</sup> The present system was an outgrowth of an earlier proposal for reform of judicial elections in Los Angeles County. That proposal was drafted by the bar, which lobbied for passage of the constitutional amendment through the Legislature and then campaigned unsuccessfully for its approval by the voters. (See Smith, *The California Method of Selecting Judges* (1951) 3 Stan.L.Rev. 571.)

decisions, we conclude that the activities of the bar should be governed by the standards applicable to governmental agencies. Thus lobbying, amicus curiae briefs, and the annual conference of delegates can be financed through dues as presently done. The bar, however, may not engage in election campaigning; its activities in publicizing Murray's 1982 speech and distributing the educational packet violated that prohibition. In light of past uncertainty concerning the scope of the bar's authority, however, we hold that the governors are not personally liable for the unauthorized expenditures.

The judgment of the Court of Appeal is reversed, and the case remanded for further proceedings consistent with this opinion.

BROUSSARD, J.

WE CONCUR:

MOSK, J.

ARGUELLES, J.

CLINTON W. WHITE\*

\*Presiding Justice of the Court of Appeal, First Appellate District, Division Three, sitting under assignment by the Chairperson of the Judicial Council

## C O P Y

EDDIE KELLER *et al.* v. STATE BAR OF CALIFORNIA  
*et al.*

S.F. 25050

CONCURRING AND DISSENTING  
OPINION BY KAUFMAN, J.

I concur in the majority's conclusions that the State Bar is precluded from engaging in election campaigning and that the bar's publication of president-elect Anthony Murray's 1982 speech and distribution of the educational package violated that prohibition. I further concur in the majority's holding that the bar governors are not personally liable for reimbursement of the unauthorized electioneering expenditures. I respectfully dissent, however, from its holding that, because of the State Bar's status as a governmental agency, its expenditure of objecting members' mandatory dues for political or ideological causes is lawful and exempt from constitutional scrutiny.

DISCUSSION

The majority opinion considers the California State Bar to be "best described as analogous to a governmental agency." If viewed as a governmental agency, the majority declares, the bar is not subject to First Amendment constraints when spending its objecting members' mandatory dues because a governmental agency may expend tax revenues to perform its statutory duties without restrictions and "the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial." (Maj. opn. at p. [typed opn. at pp. 23-24].) Therefore, the majority concludes, the bar may

properly spend funds for "all matters pertaining to the advancement of the administration of justice," (Bus. & Prof. Code, § 6130, subd. (a).), which it defines expansively as virtually anything having to do with law, except electioneering.

While it correctly characterizes the State Bar as a governmental agency, the majority opinion is incorrect in concluding that because the State Bar is a governmental agency its expenditure of objecting members' dues is exempt from First Amendment scrutiny. That error is grounded in the majority's failure to recognize the significance of a crucial fact: The California State Bar derives its funds from membership dues which all attorneys, and only attorneys, in California are required by law to pay as a condition precedent to pursuing their livelihood – the practice of law – in the state. It is this fact – compelled membership in a professional association with mandatory dues as a condition to practice the profession of law – that subjects the State Bar to the constitutional scrutiny from which most other governmental agencies may be exempt. In an unbroken line of cases, the United States Supreme Court has held that, when a state compels membership in an association as a condition precedent to earning a livelihood, the association's objecting members' First Amendment rights are infringed by its expenditure of mandatory membership dues for philosophical, political or ideological causes.

Resistance to coerced association and intolerance of government-enforced support of philosophical, religious, political or ideological causes animated the founding of our nation and the drafting of its Constitution. Thomas Jefferson wrote in 1779 "that to compel a man to furnish



contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." (Brant, James Madison: The Nationalist (1948) p. 354.) Madison warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases. . . ." (II Writings of James Madison (Hunt ed. 1901) p. 186.)

These principles have guided the United States Supreme Court's First Amendment jurisprudence. "If an association is compelled, the individual should not . . . be required to finance the promotion of causes with which he disagrees." (Machinists v. Street (1961) 367 U.S. 740, 776 [Douglas, J., conc.].) "[T]he First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other." (Id. at p. 791 [Black, J., dis.].) First Amendment principles "prohibit the [state] from requiring any [individual] to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." (Abood v. Detroit Board of Education (1977) 431 U.S. 209, 235.) Individuals can "be required to become 'members' of [an association], but those who object[] [can]not be burdened with any part of the [association's] expenditures in support of political or ideological causes." (Ellis v. Railway Clerks (1984) 466 U.S. 435, 447.) "The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of [the dissenters'] interest in not being compelled to subsidize the propagation of political or ideological views that they

oppose is clear." (Chicago Teachers Union v. Hudson (1986) 475 U.S. 292, [106 S.Ct. 1066, 1075].) Indeed, *Hudson* emphasized this point by relying on the principles expressed by Thomas Jefferson and James Madison quoted above. (Id. at p. \_\_\_, fn. 15 [106 S.Ct. at p. 1075]; see also *Abood* at pp. 234-235, fn. 31; *Street* at p. 778, fn. 4 [Douglas, J., conc.].)

The United States Supreme Court has thus steadfastly invalidated coerced association to the extent it enforces financial support of political and ideological causes to which a member objects. In a series of decisions, the court has prohibited unions from expending the mandatory dues of objecting members for such causes not sufficiently related to the governmental interests justifying coerced association. (*Ellis*, supra, 466 U.S. at p. 447.) As I explain below, these same First Amendment principles also preclude the California State Bar from spending its objecting members' mandatory dues for controversial causes not sufficiently related to the governmental interests that justify compulsory bar membership.

In this connection it is essential to keep in mind that except as to expenditures for electioneering, the principal question in this case is not whether the State Bar may lawfully make the expenditures at issue, but whether in doing so it may utilize the compulsory dues of objecting members and thereby compel those members to support causes they oppose. Simply concluding, as the majority does, that the State Bar is authorized to make the expenditures to which plaintiffs object does not resolve the constitutional question of whether plaintiffs' First Amendment rights are infringed by the expenditure of

their compulsory dues for political and ideological activities to which they object.

I. *Expenditure of Dues for Political and Ideological Activities Violates the First Amendment*

A. *Historical Origins*

In *Railway Employees' v. Hanson* (1956) 351 U.S. 225, the United States Supreme Court first considered a challenge to a "union shop" agreement.<sup>1</sup> Nonunion employees complained that such an agreement, by forcing them "into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought," violated their First Amendment rights. (Id. at p. 236.) Because the challenge was directed to the facial validity of the Railway Labor Act, the court confined its inquiry to the statute, holding that Congress, acting under its broad commerce clause powers,<sup>2</sup> could reasonably determine that industrial peace required all employees who benefited from union representation to support financially "the work of the union in the realm of collective bargaining." (Id. at p. 235.) The court specifically noted, however, that

<sup>1</sup> A union shop agreement is a provision in a collectively bargained agreement which requires employees, within a certain period of time after being hired, to join and maintain membership in the union. (See § 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh.)

<sup>2</sup> The court noted that the commerce clause Power "often has the quality of police regulations." *Hanson*, supra, 351 U.S. at p. 235.)

First Amendment problems would arise if " 'assessments' are in fact imposed for purposes not germane to collective bargaining." (Ibid.) Thus, the court indicated the possibility of a First Amendment challenge in situations where a union, under a union shop agreement, required objecting employees to support financially activities not germane to the union's collective bargaining duties. (See id. at p. 238.)

Just such a challenge was presented in *Machinists v. Street*, supra, 367 U.S. 740, 749. In *Street*, the plaintiff alleged that the union, which required him to pay dues under a union shop agreement, used these funds "to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed." (367 U.S. at p. 744.) The court chose, however, to avoid the constitutional question, basing its decision instead on an interpretation of the relevant statute. It held that Congress, in enacting the union shop provision (§ 2, Eleventh, of the Railway Labor Act), never intended to grant the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. (Id. at p. 768.)

B. *The Court's Consideration of Integrated Bar Associations*

In a companion case to *Street*, supra, 367 U.S. 740 (*Lathrop v. Donohue* (1960) 367 U.S. 820), the United States Supreme Court considered a challenge by members of the Wisconsin State Bar to an order of the Wisconsin Supreme Court requiring all attorneys to become bar members. The plaintiff, a Wisconsin attorney, had paid



his dues under protest and sued for a refund, claiming that the state bar used his dues to engage in political activities which he opposed and that, by coercing him to join the bar and support its political activities, the Wisconsin Supreme Court order integrating the state bar was unconstitutional.

The United States Supreme Court concluded that by integrating the bar the Wisconsin Legislature and Supreme Court had advanced the public interest "by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice" (Lathrop, *supra*, at pp. 831-832). Relying on its analysis in *Hanson*, *supra*, 351 U.S. 225, the court stated that "the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (Lathrop at p. 843.) Several points underlying this holding have particular significance to the instant case.

First, it is significant that the court considered the regulatory function of the Wisconsin State Bar to be the primary justification for the compulsory membership requirement. (See Schneyer, *The Incoherence of the Unified Bar Concept* (1983) Am.B.Found.Res.J. 1, 54-55 ["Basically, Brennan saw the state bar as a public agency created to fund and administer regulatory or governmental programs."].) Second, the court employed language reminiscent of its commerce clause decisions. This suggests that

the state's regulatory or police power, similar in scope to Congress' commerce clause power (see ante, fn. 2), was the actual source of authority underlying integration of the bar. (Accord *Herron v. State Bar* (1944) 24 Cal.2d 53, 64.) Both these points emphasize the court's identification of the justifying governmental interest as the advancement of the delivery of quality legal services to the public. Finally, the court implicitly balanced the state's interest in regulating the legal profession with what, in that case, appeared to be a minimal intrusion into the attorneys' associational and speech rights.<sup>3</sup> (Schneyer, *The Incoherence of the Unified Bar Concept*, *supra*, at p. 51.)

---

<sup>3</sup> The court emphasized that "the bulk of State Bar activities" were involved in raising educational and ethical standards, with the ultimate objective of improving the quality of legal services available to the public. (Lathrop, *supra*, 367 U.S. 820, 843.) Thus, the court found that the allocation of bar resources to political activities was minimal. More recent decisions have established, however, that even slight interference with an individual's speech or associational rights violates the First Amendment. (*Chicago Teachers Union v. Hudson*, *supra*, 475 U.S. at p. \_\_\_ [106 S.Ct. at p. 1075]; *Ellis v. Railway Clerks*, *supra*, 466 U.S. at pp. 442-444.)

Further, the court indicated that because the membership requirement was limited "to the compulsory payment of reasonable annual dues," it considered insignificant any infringement upon members' associational rights. (Lathrop, *supra*, 367 U.S. at p. 843.) Again, recent cases establish that the First Amendment protects an individual's rights not to associate and not to speak - the so-called "negative speech rights" - just

(Continued on following page)



The court managed to avoid the plaintiff's claim that the bar's use of his mandatory dues to support political activities violated the First Amendment by finding the record insufficiently developed in this regard. (*Lathrop*, supra, 367 U.S. 820, 845-846.) It is significant to the case before us, however, that only four of the justices deemed the constitutional issue not ripe for adjudication (Chief Justice Warren and Associate Justices Brennan, Clark and Stewart), while five justices considered the issue to be squarely presented. Of these five, two found the use of objecting members' mandatory dues for political purposes to be constitutional (id. at p. 865 [Harlan, J., conc. in judgment, joined by Frankfurter, J.]), two found such use to be unconstitutional (id. at p. 871 [Black, J., dis.]; id. at pp. 884-885 [Douglas, J., dis.]), and one considered the practice of law to be a "special privilege" and thus not a "right" protected by the First Amendment.<sup>4</sup> (Id. at p. 865 [Whittaker, J., conc. in result].) Moreover, because the *Lathrop* majority explicitly detailed the particular facts it

---

(Continued from previous page)

as it protects an individual's rights to associate and to speak. (*Pacific Gas & Electric Co. v. Public Utilities Commission of California* (1986) 475 U.S. 1, 10-11; *Roberts v. United States Jaycees* (1980) 468 U.S. 609, 623; *Abood*, supra, 431 U.S. at pp. 234-235; see also *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624.)

<sup>4</sup> The United States Supreme Court has since "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.'" (*Sugarman v. Dougall* (1973) 413 U.S. 634, 644 [quoting *Graham v. Richardson* (1971) 403 U.S. 365, 374].)

would have needed to address the First Amendment question (id. at pp. 846-847), it appears that, had the record been sufficiently developed in these regards, the entire court would have agreed that the First Amendment issue was squarely presented. Indeed, the court subsequently characterized *Lathrop* by stating that "[t]he only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached." (*Abood*, supra, 431 U.S. at p. 233, fn. 29.)

Thus, at the very least, *Lathrop*, supra, 367 U.S. 820, supports the proposition that use of the mandatory bar dues of objecting members for political and ideological purposes presents a clear constitutional question. Subsequent cases have established that even the generalized allegations found wanting in *Lathrop* are sufficient to raise the First Amendment challenge. (See *Abood*, supra, 431 U.S. at p. 241; *Arrow v. Dow* (10th Cir. 1981) 636 F.2d 287, 289.)

The majority in this case avoids the constitutional issue by labeling the State Bar as a "governmental agency," and concluding that a "governmental agency may use *unrestricted* revenue . . . for any purposes within its authority." (Maj. opn., at p. [typed opn. at p. 24], italics added.) What the majority fails to recognize, however, is that under federal constitutional law the use of objecting members' mandatory dues for political or ideological purposes is *not unrestricted*. *Abood*, supra, 431 U.S. 209, and its progeny make this abundantly clear as I shall further explain in the following section.

Further, the majority's effort to distinguish the California State Bar from the integrated bars of other states,

including Wisconsin, whose courts have uniformly applied the *Abood* holding to analyze the question of use of mandatory bar dues (see post, pp. \_\_\_\_ - \_\_\_\_ [typed opn., pp. 15-16]), is unpersuasive. Simply saying that none of these states' bars "rest upon a constitutional and statutory structure comparable to that of the California State Bar" does not explain why such a distinction renders the California State Bar immune from the First Amendment constraints, while the Wisconsin Bar is not. The United States Supreme Court's decision in *Lathrop*, supra, 367 U.S. 820, clearly supports the proposition that an integrated bar's use of mandatory dues of objecting members for political or ideological causes is subject to constitutional scrutiny. It was not until the decision in *Abood v. Detroit Board of Education*, supra, 431 U.S. 209, however, that the court explicated the First Amendment issue.

### C. The Constitutional Issue

In *Abood*, the United States Supreme Court first addressed the constitutional issues raised when a union, or, as I would hold, an integrated state bar, spends objecting members' dues for political or ideological purposes. Because the freedom to associate for the purpose of advancing ideas and beliefs is protected by the First Amendment, the court reasoned that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment." (*Abood*, 431 U.S. at p. 234.) Recognizing further that the First Amendment is violated when one is "compelled to make, rather than prohibited from making, contributions for political purposes" (*id.*), the court concluded that the

Constitution "prohibit[s the state] from requiring [an individual] to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." (*Id.* at p. 235.)<sup>5</sup>

Thus, *Abood* holds that the First Amendment prohibits the state from coercing an individual, by threatening the loss of his livelihood, to financially support ideological or political causes to which he objects. (*Abood*, supra, 431 U.S. 209, 235-236; *Ellis*, supra, 466 U.S. 435, 455; cf. *Wooley v. Maynard* (1977) 430 U.S. 705, 715; *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, supra, 475 U.S. at p. 9; *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, 100.) The event that triggers the constitutional inquiry is the state's authorizing, or compelling, support of political or ideological causes through the coercive threat of the loss of one's livelihood for refusing to contribute. Attorneys are forced

---

<sup>5</sup> In *DeMille v. American Federation of Radio Artists* (1947) 31 Cal.2d 139, this court rejected the plaintiff's contention that union expenditure of a special assessment for a political cause with which he disagreed was compelled speech and thus violated the First Amendment. We distinguished the political use of compelled union fees from the flag salute cases (e.g. *West Virginia State Board of Education v. Barnette*, supra, 319 U.S. 624) by reasoning that the "member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest." (*DeMille*, supra, at p. 149.) We held that once the member pays any dues or assessments to the association, they "become the property of the association and any severable or individual interest therein ceases upon such payment." (*Ibid.*) *Abood*, supra, 431 U.S. 209, *Ellis*, supra, 466 U.S. 435 and *Hudson*, supra, 475 U.S. 292 have since invalidated this line of reasoning.

to join the State Bar as a condition precedent to practicing law in the state, just as employees are forced to support unions under provisions for union and agency shops. While the state's need to regulate the legal profession may justify such coercion, it does not justify compulsory financial support of political or ideological causes by objecting members.

Thus, when the State Bar spends a portion of compulsory membership dues on political or ideological causes rather than on regulatory functions, the identical First Amendment concerns which faced the United States Supreme Court in *Abood*, supra, 431 U.S. 209, are presented. Recognizing these concerns, every other court that has considered First Amendment challenges to state bar political expenditures has applied the *Abood* analysis. (See *Gibson v. The Florida Bar* (11th Cir. 1986) 798 F.2d 1564, 1568; *Falk v. State Bar of Michigan* (1981) 411 Mich. 63, 106 [305 N.W.2d 201, 213] [Falk I]; *Falk v. State Bar of Michigan* (1983) 418 Mich. 270, 290-91 [342 N.W.2d 504, 410] [Falk II], cert. den. (1984) 469 U.S. 925; *Reynolds v. State Bar of Montana* (Mont. 1982) 660 P.2d 581, 581-582 [without citing *Abood*, court ordered refund to objecting members of dues spent for political activities]; *Petition of Chapman* (1986) 128 N.H. 24, 35-36 [509 A.2d 753, 755] [N.H. State Bar]; *Arrow v. Dow* (D.N.M. 1982) 544 F.Supp. 458, 460 [N.M. State Bar]; *Schneider v. Colegio de Abogados de P.R.* (D.P.R. 1983) 565 F.Supp. 963, 965, on remand, (D.P.R. 1988) 682 F.Supp. 674, 683-684 [bar association of P.R.]; *Hollar v. Government of the Virgin*

*Islands* (3d Cir. 1988) 857 F.2d 163, 170 [bar association of the Virgin Islands].)<sup>6</sup>

I would join the jurisdictions that apply *Abood*'s constitutional analysis. Indeed, as the cited decisions clearly demonstrate, federal constitutional law compels that analysis. As I explain in the next section, simply labeling the State Bar as a "governmental agency" does not the majority to the contrary notwithstanding, except this case from First Amendment analysis.

## II. *Governmental Expenditure of Mandatory Dues Is Not Equivalent to Governmental Expenditure of Taxes*

The majority errs further in broadly stating – without benefit of authority – that a "governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority." (Maj. opn. at p. [typed opn. at p. 23].) I agree that such a rule would apply to revenue derived from general taxes. It is well established that taxpayers may be required to financially support governmental programs and messages to

<sup>6</sup> In a pre-*Abood* constitutional challenge to state bar expenditures for political and ideological causes (*Sams v. Olah* (1969) 225 Ga. 497), the Georgia Supreme Court quoted its holding in *Machinists v. Street* (1961) 217 Ga. 351 [122 S.E.2d 220], after remand in 367 U.S. 740: "[A] labor union might be enjoined from using its funds for political purposes against the wish of an individual member, [because] this was a use of funds for purposes other than collective bargaining, the legitimate purpose of the union. . . ." (*Sams*, supra, 225 Ga. at p. 508.) Thus the *Sams* court applied essentially the same reasoning the United States Supreme Court later used in *Abood*, supra, 431 U.S. 209.



which they are ideologically or conscientiously opposed. (See, e.g., *Graves v. Commissioner* (6th Cir. 1978) 579 F.2d 392, 392 [Quakers must pay income tax despite contravention of religious principles]; *Autenreith v. Cullen* (9th Cir. 1969) 418 F.2d 586, 588 [conscientious objector must pay income tax despite use of taxes to fund warfare]; *Crowe v. Commissioner* (8th Cir. 1968) 396 F.2d 766, 767 [citizen must pay income tax despite disagreement with use of taxes to support federal welfare system]; *United States v. Lee* (1982) 455 U.S. 252, 262 [Amish employer must pay social security tax despite contravention of religious principles].)

Similarly, I perceive no First Amendment violation in the expenditure of revenues from license fees for purposes substantially related to regulation of the particular profession or industry. Indeed, this court has validated the State Bar Act "as a regulatory measure under the police power . . . and . . . held that the reasonable expenses necessary to pay the costs of enforcement of the act . . . may be imposed upon the membership in the form of fees or dues. [Citations.]" (*Herron v. State Bar*, supra, 24 Cal.2d at p. 64.)

We face a far different situation, however, when we consider the expenditure by a state agency of dues paid by a small and limited segment of the public, imposed as a condition precedent to the exercise of a profession, and expended for purposes not related to regulation of the profession. The Court of Appeal decisions to which the majority points do not support its conclusion that the source of revenue is "immaterial" to a determination of the propriety of its expenditure. To the contrary, when the revenue in question is derived from mandatory dues as a condition precedent to the practice of a profession, the ends to which the money is devoted are highly material.

In *Miller v. California Commission on the Status of Women* (1984) 151 Cal.App.3d 693, the plaintiffs filed a "taxpayers' action for declaratory and injunctive relief seeking to abolish the commission. . . ." (Id. at pp. 695-696.) Without explicitly denoting the source of funds, the opinion refers throughout to the commission's use of "public resources," and in the predecessor case (*Miller v. Miller* (1978) 87 Cal.App.3d 762), to the use of "public funds," to fund the commission's expenses. Because of the absence of any contrary indication in either of the *Miller* opinions or in Government Code section 8240 et seq. authorizing formation of the commission, one can only deduce that the "public resources" or "public funds" referred to in the *Miller* decisions were general taxes. Consequently, *Miller* stands only for the proposition that a governmental agency may spend funds derived from general taxes for any purposes within its authority, a concept well supported by precedent, but unchallenged in, and inapposite to, the case before us.

The other decision to which the majority refers, *Erzinger v. Regents of University of California* (1982) 137 Cal.App.3d 389, involved a claim by university students that their right to the free exercise of religion was violated by a portion of their mandatory registration fee being used to provide abortions, abortion counseling and abortion referrals through the student health services. The Court of Appeal analogized the payment of student registration fees to the payment of taxes, and applied a well settled line of authority holding that the "right to free exercise of religion does not justify refusal to pay taxes. . . ." (Id. at p. 393 [citing *Autenreith v. Cullen*, supra, 418 F.2d 586].) Whether or not the Court of Appeal

correctly analogized student registration fees to general taxes is debatable, but in any event this court is not bound by *Erzinger*. More importantly, I do not consider the issues in the two cases sufficiently similar to make *Erzinger* applicable to the instant case.

The students in *Erzinger* charged the University was interfering with their right to free exercise of religion, not their speech and associational rights. Unlike plaintiffs here, the *Erzinger* plaintiffs were not compelled to become members in an association, the threshold event which triggers First Amendment scrutiny of governmental action for violation of the constitutionally protected speech and associational rights. (See ante, p. [typed opn., p. 15].) Furthermore, the registration fees at issue in *Erzinger* were used strictly to finance health care within the paying group, as compared to the instant case where the State Bar fees at issue are allegedly used in part to promote political and ideological causes of concern to the general public.

Moreover, a student denied admission for failure to pay registration fees has more options, and is injured far less, than an attorney denied the right to practice law for failure to pay bar dues. It is obviously a greater hardship for the attorney to move to a different state and qualify there for admission to practice than it is for a student to enroll in a different college or university. Consistent with this distinction, courts have recognized that the pursuit of one's livelihood, be it the practice of law or some other profession, is a fundamental right. (Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 281; Anton

v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 823.)<sup>7</sup>

Further, the purported analogy between taxes and mandatory dues has been questioned, and rejected, by courts and commentators alike. In *Young Americans for Freedom v. Gorton* (Wash. 1978) 588 P.2d 195, for example, the plaintiffs sought to prevent the Washington State Attorney General from using general tax revenues to finance the filing of amicus briefs in support of ideas to which the plaintiff taxpayers objected. The plaintiffs argued that taxes are the equivalent of mandatory union dues and thus the attorney general's use of taxes to fund advocacy of ideas was proscribed by *Abood*, supra, 431 U.S. 209. The Washington Supreme Court found "no viable merit" to the plaintiff's contention that general taxes and union dues are interchangeable sources of revenue for First Amendment purposes. (Id. at p. 200.)

Federal courts, in considering constitutional challenges to the use of integrated bar membership dues for political activities, have consistently rejected the claim that they have no jurisdiction by operation of statutes

---

<sup>7</sup> In determining that a physician's hospital privileges are a vested fundamental right, the court held that a primary consideration was whether the interest in question " 'directly relates to the pursuit of [one's] livelihood.' " (Anton v. San Antonio Community Hospital, supra 19 Cal.3d at p. 823 [quoting *Edwards v. Fresno Community Hosp.* (1974) 38 Cal.App.3d 702, 705].) By this standard, the practice of law is clearly a fundamental vested right. This conclusion is further supported by the United States Supreme Court's determination that the right to practice law is fundamental and thus protected by the privileges and immunities clause. (Supreme Court of New Hampshire v. Piper, supra, 470 U.S. at p. 281.)



that prevent the federal courts from considering questions concerning the proper use of state taxes. (*Levine v. Supreme Court of Wisconsin* (W.D. Wis. 1988) 679 F.Supp. 1478, 1488-1489 overruled on other grounds in *Levine v. Heffernan* (7th Cir. 1988) \_\_\_ F.2d \_\_\_ [1988 U.S. App. LEXIS 17722] [Tax Injunction Act, 28 U.S.C. § 1341]; *Schneider v. Colegio de Abogados de Puerto Rico* (D.P.R. 1982) 546 F.Supp. 1251, 1275 [Butler Act, 48 U.S.C. § 872].)

In *Abood*, supra, 431 U.S. 209, Justice Powell observed that "[c]ompelled support of a private association [by payment of dues was] fundamentally different from compelled support of government [by payment of taxes because] government is representative of the people . . . [while] a union . . . is representative only of one segment of the population, with certain common interests." (*Abood* at p. 259, fn. 13 [Powell, J., conc.].)

Commentators have offered various reasons to distinguish taxes from mandatory dues for First Amendment purposes. Some have suggested that, as a practical matter, the sheer number of taxpayers and the complexity of government financing preclude making the *Abood* analysis applicable to objecting taxpayers. (Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association* (1983) 36 Rutgers L.Rev. 3, 24, fn. 125 [citing *United States v. Lee*, supra, 455 U.S. at pp. 259-261].) Others explain the distinction by arguing that the impact on objecting taxpayers from government "ideological" expenditures is less intrusive than the impact of controversial expenditures on dissenting union fees payors. (Tribe, *American Constitutional Law* (2d ed. 1988) § 12.4, fn. 14, p. 808.)

Whether or not one finds these arguments persuasive, one point is clear; a majority of the justices in *Lathrop v. Donohue*, supra, 367 U.S. 820, found that the use of mandatory state bar dues for philosophical, political or ideological causes implicates First Amendment concerns and principles. (See ante, pp. "\_\_\_-\_\_\_" [typed opn., pp. 11-12].) Labelling the State Bar a "governmental agency" cannot divert us from the First Amendment inquiry which *Lathrop*, supra, 367 U.S. 820, and *Abood*, supra, 431 U.S. 209, direct.

The majority engages in pure sophistry when it states that "no precedent supports the imposition of such [First Amendment] restrictions on a governmental agency." (Maj. opn., p. [typed opn., p. 26].) What the majority refuses to recognize is that most of the cases involving constitutional challenges to, and limitations on, the use of mandatory bar dues involved *governmental agencies* – state bar associations. (See, e.g., *Schneider v. Colegio de Abogados de P.R.*, supra, 546 F.Supp. at p. 1264 [applying governmental immunity to Puerto Rican bar association because in disciplinary proceedings the bar acts in a prosecutorial capacity pursuant to statute]; *Falk v. State Bar of Michigan*, supra, 305 N.W.2d at p. 203 [State of Michigan acts through "combined efforts of the Michigan Supreme Court, Legislature and State Bar"]; *Petition of Chapman*, supra, 509 A.2d at p. 758 [New Hampshire Supreme Court "retains continuing supervisory authority over the [N.H. Bar] Association and its activities"]; *Arrow v. Dow*, supra, 544 F.Supp. at p. 459 ["control of dues [is] subject to the supervision of the New Mexico Supreme Court"]; *Sams v. Olah*, supra, 225 Ga. at p. 501 [Georgia State Bar is an "administrative arm of the [Georgia



Supreme Court"]; *Reynolds v. State Bar of Montana*, supra, 660 P.2d at p. 582 [Weber, J., dis.] [Montana Supreme Court "has the power to control the organization of the State Bar"]; *Hollar v. Government of Virgin Islands*, supra, 857 F.2d at p. 167 [Virgin Islands Bar Association acts as prosecutor for the district court in attorney disciplinary proceedings].) These cases indisputably subjected state bars to the First Amendment scrutiny mandated by *Abood*. (Ante, pp. 15-16.) None of these cases analyzed the constitutional issue in terms of whether the relevant state bar was a governmental agency or private association. Instead, these cases reflect the recognition that *compelled membership* subjects an association whether private or governmental – to First Amendment constraints.

Indeed, while the majority agrees that "all *Lathrop* decided was that the constitutional issues concerning the use of bar dues *should be decided*; it did not decide those issues" (maj. opn. at p. [typed opn., p. 13], italics added [citing *Abood*, supra, 431 U.S. at p. 233 fn. 29]), the majority fails to reconcile its position with that of the United States Supreme Court: Since "the [Wisconsin] State Bar is a public and not a private agency" (*Lathrop v. Donohue* (1960) 10 Wis.2d 230, 242), the United States Supreme Court obviously considered public, or governmental, agencies to be subject to First Amendment scrutiny.

Moreover, other jurisdictions have recognized that the First Amendment constrains governmental agencies which compel membership. In *Good v. Associated Students of University of Washington* (Wash. 1975) 542 P.2d 762, for example, the Washington Supreme Court held

that "the state, through the university, may not *compel membership* in an association, such as the [Associated Students of the University of Washington because] . . . [t]hat association expends funds for *political and economic causes to which the dissenters object* and promotes and espouses political, social and economic philosophies which the dissenters find repugnant to their own views. *There is no room in the First Amendment for such absolute compulsory support, advocacy and representation.*" (Id. at p. 768, italics added.) In *Galda v. Bloustein* (3d Cir. 1982) 686 F.2d 159 the plaintiffs objected to a governmental agency, the State University of New Jersey (Rutgers), requiring students to pay refundable fees to support the New Jersey Public Interest Research Group (PIRG). Acknowledging Rutgers' authority to levy and collect mandatory student fees, the court nevertheless held that *Abood* prevented it from requiring student support of PIRG if the plaintiffs could prove that PIRG supported political or ideological causes to which they objected.

Thus, the majority's assertion that subjecting governmental agencies to First Amendment restrictions is unprecedented does not withstand scrutiny. On the contrary, the weight of authority supports the view that when a state requires membership in a governmental entity, the authorized use of compelled dues for political or ideological purposes to which its members object is subject to constitutional constraints.<sup>8</sup>

<sup>8</sup> The majority asserts that the position advocated in this concurring and dissenting opinion would subject the State Bar to the "worst of both the private and the governmental

(Continued on following page)

The issue left unresolved by *Lathrop*, whether the First Amendment is violated by the State Bar's use of mandatory dues for political or ideological causes to which some members object, has subsequently been addressed by analogy in the United States Supreme Court's union decisions. (See *Ellis*, supra, 466 U.S. 435; *Hudson*, supra, 475 U.S. 292.) These cases establish the constitutional standard by which State Bar expenditures must be scrutinized.

### III. *The Constitutionality of Expending Objecting Members' Dues for Political and Ideological Causes*

#### A. *The Constitutional Standard*

A threshold issue precedent to any First Amendment analysis is whether the State Bar is legally authorized to

---

(Continued from previous page)

worlds" by, on the one hand, subjecting it to constitutional restrictions in its use of dues and, on the other hand, precluding it as a state agency from endorsing political candidates and engaging in political campaigns. (Maj. opn., fn. 19.)

What this assertion fails to recognize is that if an association derives the benefit of the force of government to compel individuals to join the association and pay membership dues, then that association should be limited in its use of those dues and that indeed such limitation is commanded by the First Amendment to the United States Constitution. Such indifference to the First Amendment rights of the 115,000 members of the California State Bar is remarkable stemming as it does from acknowledged champions of First Amendment liberties. By focusing on the distinction between private and governmental entities, the majority's approach gives the State Bar the best of both worlds, and State Bar members the worst of both worlds. In contrast, by focusing on the distinction between compulsory and voluntary association, the concurring and dissenting opinion strikes a balance between the rights of the State Bar and its members.

make the expenditures to which plaintiffs object. Indeed, if the objectionable expenditures are precluded by statute or decisional law, there is no need for further inquiry. (*Ellis*, supra, 466 U.S. at pp. 444-445.)

The State Bar is, as the majority point out, statutorily authorized to expend funds for a broad range of activities.<sup>9</sup> (See maj. opn., ante, at p. [typed opn., p. 27].) However, it is only if, or when, an expenditure is authorized by law that we are required to analyze the constitutionality of the expenditure of objecting members' mandatory dues under the First Amendment. (*Ellis*, supra, at p. 447.)

The majority has properly identified *Ellis v. Railway Clerks*, supra, 466 U.S. 435 as the authority explicating the First Amendment analysis of expenditure by a compulsory association – either union or bar association – of objecting members' dues for political or ideological causes. *Ellis* mandates a three-step analysis to determine

---

<sup>9</sup> In addition to the statutory provisions authorizing the bar to perform various regulatory functions, the Board of Governors is authorized to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." (Gov. Code, § 6031, subd. (a).)

As the majority point out, however, the State Bar as a governmental agency is precluded from participating in election campaigns. (*Stanson v. Mott* (1976) 17 Cal.3d 206; see maj. opn., ante, at p. [typed opn. at p. 33].)



which political and ideological activities may be funded by mandatory dues over members' objections.

First, it must be determined whether the activity is "germane" to the purpose which justified compulsory membership in the bar in the first place. (Id. at p. 447.) The governmental interest in the delivery of quality legal services to the public and the improvement of the legal profession have been held sufficient to justify the infringement of First Amendment rights that may occur when attorneys are required to become bar members. (Lathrop v. Donohue, *supra*, 367 U.S. at p. 843; see text ante at pp. [typed opn., pp. 8-9].) When bar activities serve this interest,<sup>10</sup> or when expenditures are "necessarily or reasonably incurred" to finance activities that serve this interest, then such expenditures are considered "germane." (Ellis, *supra*, 466 U.S. 435 at p. 448.)

If an expenditure serves the state's interest in the delivery of quality legal services to the public and the improvement of the legal profession, the second step of the *Ellis* analysis requires that we determine "whether these expenses involve additional interference with the First Amendment interests of objecting employees. . . ."

<sup>10</sup> The majority apparently equates the statutory functions of the State Bar with the state interests that may justify interference with members' associational rights. (See maj. opn. fn. 11.) It is hornbook law, however, that not all statutes rise to a level that justify state interference with basic constitutional rights. (See Tribe, *American Constitutional Law*, *supra*, § 12.2, p. 792.) As stated above, I adopt the United States Supreme Court's explication of the state interests which justify compulsory bar membership because I consider it to be authoritative.

(Id. at p. 456.) Finally, if the activities funded by the questioned expenditure do involve additional interference with First Amendment rights, we must determine "whether they are nonetheless adequately supported by a governmental interest." (Ibid.)

Thus, if a bar activity impinges upon First Amendment interests beyond the interference inherent in compulsory membership in the first instance, the bar must identify a governmental interest that justifies such additional interference. For example, the investigation of charges of attorney misconduct or the administration of the bar examination do not appear to interfere with members' First Amendment interests. Lobbying the Legislature for approval of the bar's proposed budget, however, would seem to implicate bar members' First Amendment rights. Nonetheless, such activity would appear justified by the governmental purposes underlying the requirement of compulsory membership in the State Bar. Without an adequate budget, the bar would be unable to conduct activities designed to advance the delivery of quality legal services to the public and to improve the legal profession.

I do not suggest the governmental interest that may justify additional interference with objecting bar members' First Amendment rights is *limited* to advancing the delivery of quality legal services or to improving the legal profession. As the majority suggests, in some circumstances the state's interest "in drawing upon [lawyers'] training and experience" may adequately justify additional infringement of bar members' First Amendment rights. (See maj. opn., ante, at p. [typed opn. at pp. 27] [quoting *Falk I*, *supra*, 305 N.W.2d 201, 231].) However, it



must remain to the State Bar and its members to work out and, if necessary, to future decisions to determine, whether other activities which additionally interfere with objecting State Bar members' First Amendment rights are justified by a sufficient governmental interest. I turn to the activities at issue in this case.

#### B. *Applying the Standard to the Present Case*

In seeking declaratory relief, plaintiffs challenge the State Bar's expenditure of objecting members' dues to fund the cost of lobbying the Legislature, filing briefs amicus curiae, holding conventions of the State Bar Conference of Delegates, disseminating the speeches of its then president-elect and conducting a public information program concerning the election of justices.

Because this matter comes to us on summary judgment, the record is not sufficiently developed to apply the constitutional standard to most of the expenditures plaintiffs challenge. Thus, I shall undertake to discuss only the constitutional parameters within which the objectionable activities should be analyzed.

##### 1. *Lobbying and Litigation Activities*

The constitutionality of the bar's expenditure of objecting members' dues to fund the cost of lobbying the Legislature or filing amicus curiae briefs cannot be determined in the abstract. The trial court would first have to determine whether the lobbying or litigation activity of which plaintiffs complain serves the governmental interest in advancing the delivery of quality legal services to

the public or improving the legal profession. If so, the court would then determine whether the challenged activity involves interference with First Amendment rights beyond that occasioned by compulsory bar membership itself. If it does, the State Bar would have the burden (see *Railway Clerks v. Allen* (1963) 373 U.S. 113, 122) of identifying some other governmental interest justifying such additional interference. (*Ellis, supra*, 466 U.S. 435 at p. 456.)

##### 2. *Conference of Delegates*

There can be little doubt that some conference activities serve the state's interest in advancing the delivery of quality legal services to the public or in improving the legal profession. It also seems possible that some conference activities do not additionally infringe objecting members' First Amendment rights beyond the infringement inherent in compelled membership.

It appears likely, however, that expenditures for some conference activities would be found to impinge additionally upon objecting members' First Amendment rights. As to these expenditures, the bar would have the opportunity to identify a governmental interest justifying the expenditure. The record before us is insufficient to make this determination. Further, the trial court made no such determination and it would be the trial court's function in the first instance to do so. Thus, it would remain to the trial court to determine upon sufficient evidence whether any of plaintiffs' dues was expended in violation of their First Amendment rights.

### 3. *Bar Officers' Speeches and Public Information Programs*

Plaintiffs do not object to publication of bar officers' speeches or public information programs in general. Generally, insofar as publication of speeches or information programs serves the state's interest in advancing the delivery of quality legal services to the public or improving the legal profession, the bar may fund such activities with objecting members' mandatory dues. If such activities do serve these interests, the court would have to determine whether the challenged expenditures interfere with objecting members' First Amendment rights beyond the interference inherent in compulsory bar membership. If they do, the court would then determine if the challenged expenditures are nonetheless justified by some other sufficient governmental interest.

I do agree, however, with the majority that President-elect Anthony Murray's speech and the public education materials, by virtue of their content and timing, constituted the adoption of a specific position in a public election. Consequently, I agree that, as a matter of law, such election activities were not legally authorized expenditures under our decision in *Stanson v. Mott*, supra, 17 Cal.3d 206. That being so, no further analysis of those expenditures under the First Amendment is necessary.

## IV. *Remedies, Reimbursement and Procedure*

### A. *Declaratory and Injunctive Relief*

To the extent that plaintiffs could, within the purview of their pleadings, establish in further proceedings that the State Bar has used mandatory membership dues of

objecting members in excess of its legal authority to expend funds, or in violation of the First Amendment principles I have discussed, plaintiffs should be entitled to the declaratory relief they seek.

To the extent that they have established or could establish that funds were spent in excess of governing legal authority, they should also be entitled to injunctive relief to prevent such expenditures in the future. (*Stanson v. Mott*, supra, 17 Cal.3d at p. 223.)

### B. *Reimbursement*

Plaintiffs have requested no monetary relief from the State Bar itself.<sup>11</sup> The only monetary relief plaintiffs have requested is for "an injunction [or writ of mandate to] issue compelling respondent and defendant members of the Board of Governors to reimburse the Treasury of the State Bar of California for all State Bar funds" wrongly expended. The State Bar, however, has not sought reimbursement from defendant governors and the authority of plaintiffs to seek reimbursement on the bar's behalf is dubious at best, as evidenced by plaintiffs' failure to assert any such authority. In any event, I agree with the majority that the governors cannot be held personally liable for reimbursement to the State Bar in view of the historical practices of the bar and in the absence of any record showing the governors knew any expenditures

<sup>11</sup> With the exception of their prayer for costs and attorneys' fees.

were unauthorized or failed to exercise "reasonable diligence" in authorizing the subject expenditures. (*Stanson v. Mott*, supra, 17 Cal.3d at pp. 226-227.)

### C. Constitutionally Mandated Procedure

As to expenditures in violation of the First Amendment, the Constitution requires the bar to adopt procedures to allow members to identify the expenditures to which they may legitimately object and to prevent the bar from utilizing objecting members' dues for such purposes. (*Hudson*, supra, 475 U.S. at p. \_\_\_\_ [106 S.Ct. at pp. 1073-1074]; *Abood*, supra, 431 U.S. at p. 237, fn. 35.)

The majority has described such a procedure as "an extraordinary burden." (Maj. opn., ante, at p. \_\_\_\_ [typed opn. at p. 20].) The procedure the majority envisions would require the bar, "whenever [it] proposed to advise the Legislature or the courts of its views on a matter, [to] first engage in the three-step analysis set out in *Ellis v. Railway Clerks* (1984) 466 U.S. 435." (Maj. opn. at p. \_\_\_\_, italics added [typed opn. at p. 19].) While the procedure envisioned by the majority might be "an extraordinary burden," the procedure mandated by the United States Supreme Court is not nearly so onerous.

As *Hudson*, supra, 475 U.S. at p. \_\_\_\_ [106 S.Ct. at p. 1076] makes clear, "'[a]bsolute precision' in the calculation of the charge to [objecting members] cannot be 'expected or required.'" [Citations.] Thus, for instance, the [association] cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The [association] need not provide [objecting members] with an exhaustive and detailed list of all its expenditures, but

adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." (*Hudson*, supra, 475 U.S. at p. \_\_\_\_, fn. 18 [106 S.Ct. at p. 1076, fn. 18].)

Therefore, contrary to the majority's assumption, the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to *Hudson*, supra, 475 U.S. 292 [106 S.Ct. 1066], the "the constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (Id. at p. \_\_\_\_ [106 S.Ct. at p. 1078].) Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof. Code § 6140.1), the argument that the constitutionally mandated procedure would create "an extraordinary burden" for the bar is unpersuasive.

While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthily that unions representing government employees have developed, and have operated successfully within the parameters of, *Abood* procedures for



over a decade.<sup>12</sup> (See Morris, *The Developing Labor Law* (2d ed. 1983 ch. 29, p. 1417.) Indeed, the Michigan State Bar has operated under a modified *Abood* procedure since 1985. (Admin. Order No. 1985-1 (1985) 420 Mich. lviii.) I have no doubt whatever the State Bar could, by adapting the *Hudson* procedures or otherwise, devise procedures that are workable, practical and meet the constitutional requirements set out in *Chicago Teachers v. Hudson*, supra, 475 U.S. 292.

### V. Conclusion

For the foregoing reasons, with the exception of the cause asserting the governors' personal liability to reimburse the State Bar for expenditures made in violation of *Stanson v. Mott*, supra, 17 Cal.3d 206, I would affirm the Court of Appeal judgment with directions to remand the

---

<sup>12</sup> The majority suggests that the "more limited functions and constituency" of a labor union (maj. opn. fn. 12) properly subject it to *Ellis* analysis, while the State Bar's improvement of the administration of justice function render it inappropriate for application of the constitutionally mandated *Ellis* test. The majority's equation of statutory functions with justifying state interests again leads it astray. As I have shown, the relevant initial inquiry must be to determine which state interests justified compulsory bar membership in the first instance. Without benefit of briefing by the parties, I hesitate to make this determination unilaterally. I note, however, that at the time of integration of the bar, improvement of the "administration of justice" connoted interests far narrower than those the majority now ascribes to the phrase. (See, e.g., Winters, *Bar Association Organization and Activities* (1954) p. 171 [defining the field of the administration of justice as "[t]he organization, personnel and operation of the courts, the bar and their allied agencies and institutions"].)

case to the trial court for further proceedings consistent with this opinion.

KAUFMAN, J.

WE CONCUR:

PANELLI, J.  
AGLIANO, Nat A.\*

\*Associate Justice, Court of Appeal, Sixth Appellate District, assigned by the Chairperson of the Judicial Council.

---

**APPENDIX B**

*CERTIFIED FOR PUBLICATION*

*C O P Y*

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

THE THIRD APPELLATE DISTRICT

(Sacramento)

---

EDDIE KELLER, et al.,	)	3 Civ. 24124
Plaintiffs and Appellants,	)	(Super.Ct.No. 307168)
v.	)	(Filed May 23, 1986)
STATE BAR OF CALIFORNIA,	)	
et al.,	)	
Defendants and Respondents.	)	

---

APPEAL from a judgment of the Superior Court of Sacramento County. Horace E. Cecchettini, Judge. Reversed with directions.

Ronald A. Zumbrun, John H. Findley and Anthony T. Caso for Plaintiffs and Appellants.

Hufstedler, Miller, Carlson & Beardsley, Robert S. Thompson, Laurie D. Zelon and Mary E. Healy; Herbert M. Rosenthal, Truitt A. Richey, Jr. and Magdalene Y. O'Rourke, for Defendants and Respondents.

---

"The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." (Cal. Const., art VI, § 9.) Under pain of criminal punishment, no person may practice law in California unless he is an active member of the State Bar. (Bus. & Prof. Code,

§§ 6125-6126.)<sup>1</sup> The Board of Governors of the State Bar, upon authorization from the Legislature, fixes and imposes an annual membership fee upon members of the State Bar, (§ 6140.) The fees are paid into the treasury of the State Bar, and become part of its funds. (§ 6144.) Plaintiffs are licensed attorneys and members of the State Bar. They assert that the State Bar and its Board of Governors utilize their compelled membership fees to promote political and ideological positions contrary to their beliefs and in violation of their First Amendment rights. The trial court granted summary judgment in favor of the State Bar and the members of the Board of Governors. The plaintiffs appeal.

The decisions of the United States Supreme Court "establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." (*Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 233 [52 L.Ed.2d 261, 283].) "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." (*Id.*, at pp. 234-235 [52 L.Ed.2d at p. 284]; citations and fns. omitted.) Those principles, the *Abood* court concluded, prohibited a school board

---

<sup>1</sup> All further statutory references are to the Business and Professions Code unless otherwise indicated.

from requiring teachers, as a condition of holding a job in a public school, to contribute to the union for the support of political and ideological causes which they opposed and which were unrelated to collective bargaining. (*Id.*, at pp. 235-236.) These same First Amendment principles prohibit the State Bar from requiring its members, as a condition of practicing law, to contribute to the support of political or ideological causes they oppose and which are not germane to the purposes of the State Bar Act.

As we shall demonstrate, the State Bar has no constitutional or legislative authority to engage in purely political or ideological activities unrelated to its statutory purposes. Its powers are limited to what we will call its regulatory and administration of justice functions. The State Bar is free to act and speak on matters germane to these functions. It may also engage in conduct germane to its purposes even though that conduct has political or ideological ramifications so long as that activity does not impose additional infringements upon First Amendment rights not justified by a compelling governmental interest. But when the State Bar acts beyond these legitimate functions, we agree with plaintiffs that its members may not be constitutionally compelled to support political and ideological positions with which they disagree through compelled membership fees as the condition of the right to practice law. Since defendants have failed to establish that there are no triable issues concerning the constitutional and statutory legitimacy of the challenged conduct, we shall reverse the judgment and remand for further proceedings.



## I

This litigation commenced when four of the plaintiffs filed a petition for a writ of mandate and complaint for declaratory and injunctive relief against the State Bar and the members of the State Bar Board of Governors. Plaintiffs allege that the State Bar, by and through the Board of Governors, has expended and will continue to expend substantial portions of the revenues derived through mandatory membership fees to advance political and ideological causes, including, but not limited to: (1) lobbying the California Legislature; (2) submitting amicus curiae briefs in cases taking positions in direct opposition to those held by some of its members; (3) financing meetings of the Conference of Delegates at which political and ideological causes are advanced; (4) publicizing the political and ideological speeches of its then president, Anthony Murray; and (5) financing a so-called public information project designed to disseminate to the general public a particular ideology regarding judicial retention elections. Plaintiffs further allege that they do not subscribe to many of the political and ideological beliefs advanced, and that they object to the use of their mandatory dues to further any such beliefs. Plaintiffs assert that to compel them to provide financial support for the advancement of any political and ideological beliefs, particularly those with which they disagree, violates their constitutional rights of freedom of speech and association, as guaranteed by the First and Fourteenth Amendments of the United States Constitution.<sup>2</sup> Plaintiffs

<sup>2</sup> The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging  
(Continued on following page)

sought a declaration that the defendants have violated their constitutional rights through the expenditure of

(Continued from previous page)

freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Freedom of association is protected both by the free speech clause of the First Amendment and the due process clause of the Fourteenth Amendment. "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." (Healy v. James (1972) 408 U.S. 169, 181 [33 L.Ed.2d 266, 279].) Thus, "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (Roberts v. United States Jaycees (1984) \_\_\_ U.S. \_\_\_ [82 L.Ed.2d 462, 474].) "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause, . . . which embraces freedom of speech." (National Asso. For The A. C. P. v. Alabama (1958) 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498].) Consequently, "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." (Kusper v. Pontikes (1973) 414 U.S. 51, 56-57 [38 L.Ed.2d 260, 266]; see generally, Tribe, American Constitutional Law (1978) §§ 12-1 to 14-13, pp. 576-885; Emerson, *Freedom of Association and Freedom of Expression* (1964) 74 Yale L.J. 1.)

The California Constitution contains similar guarantees: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech

(Continued on following page)

mandatory bar dues and the use of the name of the State Bar of California for the advancement of political and ideological purposes; an injunction restraining the use of mandatory dues and the name of the State Bar to advance such purposes; and an injunction compelling the members of the Board of Governors to reimburse the treasury of the State Bar for the amount they authorized to be expended for political and ideological purposes since September 12, 1982.<sup>3</sup> In the alternative the plaintiffs sought similar relief in a proceeding for a writ of mandate. On two subsequent occasions the complaint was amended to name additional plaintiffs.

The defendants answered and admitted that they have expended portions of the revenue from compelled

---

(Continued from previous page)

or press." (Cal. Const., art I, § 2, subd. (a).) "The people have the right to . . . petition government for redress of grievances, and assemble freely to consult for the common good." (Cal. Const., art I, § 3.)

<sup>3</sup> Plaintiffs also allege that the amount of the mandatory membership dues is set by statute and that the defendants have no discretion to lower the amount of the dues or to rebate a portion of the dues to members who object to the use of dues to advance political and ideological purposes. This allegation is erroneous. The board, not the Legislature, sets the amount of the annual dues, although it must be set within a maximum set by the Legislature. (§ 6140.) And the board may provide by rule for the waiver of the payment of the annual membership fee by any member, or any portion thereof, or any penalty thereon. (§ 6141.1.) Nonetheless, the record makes clear that the board believes it has the right to engage in political and ideological activity supported by membership fees of dissenting members, and it refuses to waive payment of any portion of such members' dues.

membership fees for purposes of lobbying the Legislature, filing amicus curiae briefs in litigation, financing meetings of the Conference of Delegates, publicizing the speeches of the president of the State Bar, and for financing a public education project on the judiciary. They deny, however, that these expenditures were in violation of the plaintiffs' constitutional rights. Defendants also set forth as affirmative defenses: (1) the failure to state a cause of action; (2) laches; (3) estoppel and/or unclean hands; and (4) that they are privileged to do the acts complained of due to legislative authorization and that they acted in good faith.<sup>4</sup> The trial court sustained the demurrer of the plaintiffs to the defense of estoppel and/or unclean hands without leave to amend.

Defendants moved for summary judgment, or in the alternative summary adjudication of issues or judgment on the pleadings. The plaintiffs countermoved for partial summary judgment.

Although the parties submitted much documentation in support of and in opposition to the respective motions, there is no real factual dispute about the State Bar and its recent activities. As the California Supreme Court recently recounted, "[i]n 1927, the Legislature adopted the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) establishing 'what is known as an "integrated" bar, i.e.,

---

<sup>4</sup> Defendant Phyllis M. Hix answered separately from the other defendants. Although she answered the allegations of the complaint in the same manner as the other defendants, the only affirmative defenses she set forth were the failure to state a cause of action, and that her actions were privileged. Hix is not involved in this appeal.



an organization of members of the legal profession of the state with a large measure of self-government, performing such functions as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice.' (1 Witkin, Cal. Procedure (1970 ed.) Attorneys, § 157, p. 168.)" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557.)<sup>5</sup> Thus, the State Bar is authorized to establish an examining committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill[ed] the requirements. . . ." (§ 6046, subds. (a), (c).) Under the board's auspices, local administrative committees may investigate complaints about the conduct of members and may thereafter forward reports and recommendations to the board for action. (§ 6043, subds. (a), (c).) After a hearing, the board "has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproof, public or private, with such recommendation." (§ 6078.) "In those two areas, the bar's role has consistently been articulated as that of an administrative

---

<sup>5</sup> "An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments." (Note, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined* (1980) 22 Ariz. L. Rev. 939, 941, fn. omitted.) It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. (See Winters, *Bar Association Organization and Activities* (1954) p. 1.)

assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. In the area of admission to practice, an applicant is admitted only by order of the Supreme Court which, upon certification by the bar's examining committee that the applicant fulfills the admission requirements, 'may admit such applicant as an attorney at law in all the courts of this State. . . .' " (*Saleeby, supra* at p. 557; citations omitted.) In addition to those duties, the State Bar enforces the law relating to the unlawful practice of law and illegal solicitation (§§ 6030, 6125-6131, 6150-6154), administers an arbitration system for fee disputes (§ 6200-6206), maintains a client security fund (§ 6140.5) and engages in other similar matters relating to the legal profession. For the sake of convenience, we shall refer to these activities as the State Bar's regulatory function.

In addition to its regulatory powers, the board is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." (§ 6031, subd. (a).)<sup>6</sup> This has been called the "laudable general purpose

---

<sup>6</sup> In addition, the board is authorized by that subdivision to aid in "all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

In 1984 the Legislature restricted the administration of justice function by prohibiting the board, or anyone under its auspices, from engaging in any evaluation of appellate justices. Section 6031, subdivision (b) now reads: "Notwithstanding this section or any other provision of law, the board shall not

(Continued on following page)



of the [State Bar] act." (Herron v. The State Bar (1931) 212 Cal. 196, 199.) The bar's general counsel has described section 6031 as "the spring board for State Bar activities." (Use of Mandatory State Bar Dues, Assembly Committee on Judiciary, hearing 9/17/79, letter of Herbert M. Rosenthal, p. 111.) We shall call this the State Bar's administration of justice function. Some of these functions have been statutorily delineated; most have not. For example, the State Bar is mandated by statute to cooperate with and give assistance to the Commission on Judicial Performance (Gov. Code, 68725), to assist the Law Revision Commission (Gov. Code, § 10307), and to evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record. (Gov. Code, § 12011.5.)

In aid of all of its powers, the State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes."

---

(Continued from previous page)

conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature. [¶] The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such evaluation, review, or report in his or her individual capacity. [¶] The provisions of this subdivision shall not be construed to prohibit an evaluation of potential judicial appointees or nominees as authorized by Section 12011.5 of the Government Code." (Stats. 1984, ch. 16, § 2, p. \_\_\_\_.)

(§ 6001, subd. (g).) In sum, the State Bar has two legitimate but divergent functions: one is to regulate the practice of law and the other to advance the administration of justice.

To carry out its functions, the State Bar is governed by a Board of Governors of 22 members, 16 of whom are members of the State Bar and 6 of whom are nonattorneys appointed by the Governor of the State with approval of the Senate. (§§ 6010, 6011, 6013.5.) Fifteen of the attorney members of the board are elected by the members of the State Bar from geographical areas established by the Legislature, and one member is elected by the board of directors of the California Young Lawyers Association. (§§ 6012, 6013, 6013.4.) The board elects the officers of the State Bar. (§§ 6021-6024.) The State Bar has established a Conference of Delegates, which consists of representatives of voluntary local and special bar associations. The conference meets once a year to consider proposals, many of which are intended for legislative action. The board has also from time to time established committees or sections open to members of the bar interested in particular areas of the law and which advise the board in those areas. The board has also appointed commissions, which include nonattorneys as members. The board employs lobbyists to assist in the bar's legislative program.

There are, concededly, "difficult problems in drawing lines" between activities related to the governance and regulation of the practice of law and engaging in recommendations for the improvement of the administration of justice on the one hand and those relating to ideological activities unrelated to such functions on the other hand. (See *Abood v. Detroit Board of Education*, supra, 431 U.S.

at p. 236 [52 L.Ed.2d at p. 285].) But the State Bar has made no showing in its motion for summary judgment that it did not use compelled membership fees to advance political and ideological causes which were not reasonably related to the regulation of the practice of law or the advancement of the administration of justice, or if germane, which do not impose additional and unjustified burdens on First Amendment rights. Although the State Bar expended substantial sums in lobbying the Legislature in years past, it did not undertake in its motion to show that its lobbying efforts were limited to the advancement of its statutory purposes. It has also underwritten some of the cost of the Conference of Delegates and the conference has occasionally strayed from matters relating to the administration of justice to more global issues of statecraft. In 1981, for example, the Conference of Delegates considered such issues as the Federal War Powers Act, limiting the United States presidency to a single six-year term, the participation of American athletes in the Olympics and Pan American games, and the federal budget. In 1982 the conference had scheduled consideration of resolutions on such issues as the repeal of the presidential proclamation concerning draft registration, a bilateral nuclear weapons freeze, a transfer of funds from the federal military budget to meet specified social needs, establishment of Dr. Martin Luther King, Jr.'s birthday as a national holiday, and legislative reapportionment.

In 1982 the State Bar engaged in two other activities which the plaintiffs abhor. First, was the use of compelled membership fees to finance and publicize the speeches of then president Anthony Murray. The second was the use

of compelled membership fees for a public education project. Both concerned judicial retention or recall elections. In September, Murray used the occasion of his swearing in as president to adopt what is described as a political and ideological position on judicial retention, and to announce the statewide public education project. Murray adopted the position that the only legitimate basis for voting not to retain a justice in a retention election is a showing of incapacity or misconduct. He described the views of those who disagree as "the idiotic cries of self-appointed vigilantes," and "hysterical 'soft-on-crime' rantings." Those who hold such views were depicted as "self-seeking prosecutors and lawyers who want to be judges," "unscrupulous politician[s]," "bullies," and "political mercenaries who are trying to pull down our legal system." Naturally, dissenters are offended by being forced to underwrite their own public vilification.

The public education project was designed to support and spread the views expressed by Murray. It consisted of materials sent to local groups with instructions on the best means of educating the public in accordance with those views. In order to promote the education project the board passed a resolution stating that it is the duty of attorneys to support an independent judiciary and calling upon members of the State Bar to take steps to educate the public on such matters. Murray utilized this resolution in seeking support for his views from local groups.

Plaintiffs object to being compelled to provide financial support for the advancement of any political and



ideological beliefs as a condition to practicing their profession. The defendants do not deny that they use compelled membership fees to promote political and ideological views. They assert that they have the right to do so, and that plaintiffs' suit is an attempt by a minority to impose their will upon the majority, or to stifle the speech of the majority.<sup>7</sup>

Although defendants' principal motion was for summary judgment, they originally supported the motion by only two innocuous declarations. Both were by the bar's

---

<sup>7</sup> In fact, nothing in the record supports the conclusion that the views of the State Bar as adopted by the Board of Governors actually reflect the ~~views~~ of the majority of the membership. In September and October, 1980, the Field Research Corporation conducted a survey of the membership for the State Bar. With regard to legislative lobbying, 65 percent of the membership felt that the State Bar should actively lobby to affect the outcome of legislation which affects the practice and procedure of law, and another 25 percent felt the bar should take a position as an organization on such matters. With regard to legislation affecting the economic interest of lawyers, 46 percent felt the bar should actively lobby, and 25 percent felt the bar should take a position. With regard to areas of substantive law where lawyers have special expertise, 42 percent felt the bar should lobby, and 36 percent felt the bar should take a position. With regard to social issues in which there is substantial public controversy, only 9 percent felt the bar should lobby, and 27 percent felt the bar should take a position. On matters involving social issues upon which there is little or no public controversy, 6 percent felt the bar should lobby, and 17 percent felt the bar should take a position. An apt generalization could be that the further removed an issue is from the practice of law the smaller is the portion of the membership which will support bar activity in advancing a view.

legislative representatives and both of these lobbyists declared that they represented the "State Bar of California as a public corporation and not the individual members." Subsequently, the defendants filed supplemental declarations in support of their motion. The declaration of Truitt A. Richey, Jr., an attorney employed in the Office of the General Counsel, described the bar's amicus curiae program. Mr. Richey asserted that it was his "observation that this participation [in the amicus curiae program] has been limited to issues basic to the State Bar, e.g., validity and interpretation of the State Bar Act or State Bar rules; validity and interpretation of legislation that the State Bar has sponsored; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships." Mr. Richey then set forth a brief description of the matters in which the State Bar had participated as amicus curiae since January 1977. Those descriptions support Mr. Richey's observation. Mary G. Wailes, an attorney and Secretary of the bar, filed a series of declarations. They generally described the legislative oversight of the State Bar, its relationship with its members and the public, the Conference of Delegates, and other organizational matters.

Code of Civil Procedure section 437c, subdivision (b) directs that a motion for summary judgment "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken." Subdivision (c) of that section mandates that the "motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving



party is entitled to a judgment as a matter of law." It follows then as a matter of statutory dictate that "[s]ummary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (Lipson v. Superior Court (1982) 31 Cal.3d 362, 374; citations omitted.)

As we have noted, defendants made no showing at all in support of their motion for summary judgment that the State Bar did not use compelled membership dues to advance political and ideological causes. No doubt the reason for that omission was the defendants' categorical position that the State Bar is a governmental agency and, like all government, may engage in purely political and ideological conduct. That contention is the lynchpin upon which this case hangs or falls.

The trial court granted summary judgment in favor of the defendants. It agreed that the State Bar is a governmental agency authorized to do the acts which plaintiffs find objectionable. While express constitutional or statutory authorization did not exist for all of the activities, the court felt such authority should be implied. The court found that the First Amendment is not a bar to these activities. With regard to the individual defendants, the court found that the plaintiffs failed to show they did not act with due care, and that it appeared they acted in good faith. Judgment was entered in favor of all defendants. This inevitable appeal followed.

## II

We begin our journey by sketching the constitutional terrain we must traverse. In *Railway Employees' Dept. A.F.L. v. Hanson* (1955) 351 U.S. 225 [100 L.Ed. 1112], the United States Supreme Court was confronted with a claim that government-sanctioned compelled membership in a union as a condition of continued employment was a violation of the free speech clause of the First Amendment. The case involved a challenge to the federal Railway Labor Act (45 U.S.C. § 152), which provided that, notwithstanding any state law, a carrier and a union could agree that all employees were required to join the union. The Court upheld the provision, noting that the wisdom of the legislation was not at issue and that Congress could properly conclude that employees who receive the benefits of union representation in collective bargaining should be required to share financial support for it. (351 U.S. at pp. 233-235 [100 L.Ed. at pp. 1131-1132].) But the United States Supreme Court cautioned in *Hanson*: "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." (*Id.*, at p. 235 [100 L.Ed. at p. 1132].) The record contained no evidence that the compelled union dues were used for any purpose other than collective bargaining, and the court held that on the record there was no more infringement or impairment of First Amendment rights than in the case of a lawyer who is compelled to be a member of an integrated bar. (*Id.*, at p. 238 [100 L.Ed. at pp. 1133-1134].)

In 1961, in *International Machinists v. Street*, 367 U.S. 740, [6 L.Ed.2d 1141], the Court considered another challenge to a union-shop agreement under the Railway

Labor Act. In that case there was evidence that the compelled union dues were used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." (367 U.S. at p. 744 [6 L.Ed.2d at p. 1147].) Rather than consider the constitutional questions, the Court construed the Act to prohibit the use of compulsory dues for political purposes, and remanded the case to the Supreme Court of Georgia to devise a remedy. (*Id.*, at p. 768 [6 L.Ed.2d at pp. 1160-1161].) As the high court later recounted, the *Street* court "held that the Act does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked. The Court did not express a view as to 'expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support union political activities.'" (Ellis v. Railway Clerks (1984) \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 436], citations omitted.)

In a companion case to *Street*, the Court considered a challenge to the Wisconsin integrated bar on constitutional grounds. (Lathrop v. Donohue (1961) 367 U.S. 820 [6 L.Ed.2d 1191].) Although the court could not agree on an opinion, six of the members of the court were of the view that a state may constitutionally condition the right to practice law on membership in an integrated bar. (367 U.S. at p. 843 [6 L.Ed.2d at p. 1205], plurality opinion, and 367 U.S. at p. 849 [6 L.Ed.2d at pp. 1208-1209] concurring opinion.) The Court did not reach a decision

on whether an integrated bar may constitutionally use compelled membership fees for political and ideological purposes. The plurality opinion found that "the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]." (367 U.S. at p. 843 [6 L.Ed.2d at p. 1205].) The four member plurality found that the issue was not presented on the record before the Court, and accordingly the question whether an attorney may be compelled to provide financial support for political activities he opposes was not decided. (*Id.*, at pp. 847-848 [6 L.Ed.2d at pp. 1207-1208].)

The question of compulsory fees as a condition of employment arose again in *Abood v. Detroit Board of Education*, supra, 431 U.S. 209 [52 L.Ed.2d 261]. In that case the board had entered into a contract with a teachers' union pursuant to which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues of members, a so-called "agency shop" agreement. Although the Supreme Court recognized that compelling employees to contribute financial support to their collective bargaining representative does have an "impact" on their First Amendment rights, insofar as the service fees were used for collective bargaining, contract administration, and grievance adjustment purposes the fees were nevertheless permissible under the decisions in *Hanson* and *Street*. (431 U.S. at pp. 222-223, 232 [52 L.Ed.2d at pp. 276, 282].)<sup>8</sup>

<sup>8</sup> The history of the *Hanson*, *Street* and *Abood* trilogy was recently expostulated in *San Jose Teachers Assn. v. Superior*



*Abood* presented the issue which had not been decided in *Hanson* and *Street*: whether compelled fees as a condition of employment could be used for political and ideological purposes unrelated to collective bargaining. This was so because the Michigan Court of Appeals had held that state law permitted the use of fees for such purposes, and the plaintiffs had alleged that such expenditures were made. On this question the Court had no difficulty in declaring that the agency-shop agreement and the state law which permitted it violated the federal constitution. "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. [Citations.] Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. [Citations.]" (431 U.S. at pp. 233-234 [52 L.Ed.2d at p. 283].) The First Amendment, the court further ruled, protects the right to contribute to an organization to spread a political message the contributor espouses, and the amendment is no less infringed where contributions are compelled rather than prohibited. (431 U.S. at p. 234 [52 L.Ed. at p. 284].)<sup>9</sup>

---

(Continued from previous page)

Court (1985) 38 Cal.3d 839. As the California Supreme Court noted, the *Abood* court "reject[ed] the arguments of protesting employees that *Hanson* and *Street* should not control in *Abood* because of the distinctive nature of public employment." (*Id.*, at p. 846, fn. 2.)

<sup>9</sup> More recently, the high court declined to view a challenged impairment of associational rights "through the prism

(Continued on following page)

The *Abood* court did not hold that the union could not constitutionally spend funds for the expression of political and ideological views. Rather, it held that such expenditures must be financed from the charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will. (*Id.*, at pp. 235-236 [52 L.Ed.2d at pp. 284-285].) As the high court later noted, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees." (Minnesota Bd. for Community Colleges v. Knight (1984) 465 U.S. 271, 291 [79 L.Ed.2d 299, 316, fn. 13].) In sum, the *Abood* court "found no constitutional barrier to an agency shop agreement between a municipality and a teachers' union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance

---

(Continued from previous page)

of procedural due process protections necessary for deprivations of property. As in *Abood*, we analyze the problem from the perspective of the First Amendment concerns." (Chicago Teachers Union v. Hudson (1986) \_\_\_ U.S. \_\_\_ [89 L.Ed.2d 232, 245, fn. 13].) The First Amendment requires its own safeguards to "insure that the government treads with sensitivity in areas freighted with First Amendment concerns." (*Id.*, at p. \_\_\_ [p. 245, fn. 12].) Since the allowance of an agency shop is itself an impingement upon First Amendment rights, the government and the union have a responsibility to minimize that impairment and to facilitate a dissenter's ability to protect his rights. (*Id.*, at p. \_\_\_ [pp. 247-248, fn. 20].)



adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." (*Ellis v. Railway Clerks*, *supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 441].) As we have noted, the *Abood* court recognized that difficult problems would arise in drawing lines between activities which are permissibly financed by compelled fees and those which are not. It did not attempt to draw such a line because the case was presented after a judgment on the pleadings without an evidentiary hearing. (*Abood*, *supra*, 431 U.S. at p. 236 [52 L.Ed.2d at 285].)

The high court had occasion to draw that line in *Ellis v. Railway Clerks*, *supra*, \_\_\_ U.S. at p. \_\_\_ [80 L.Ed.2d at p. 441], when it was called upon "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." The court held that under the Railway Labor Act "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the

bargaining unit." (*Id.*, at p. \_\_\_ [80 L.Ed.2d at p. 442].)<sup>10</sup> If the challenged expenditures are authorized by the Act, then the only constitutional issue remaining is "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." (*Id.*, at p. \_\_\_ [80 L.Ed.2d at p. 447].)

The central question in this case is whether the constitutional limitations of *Abood* apply to an integrated bar association. Stated another way, the issue is whether a lawyer, as a condition to becoming and remaining an attorney with the right to practice law, may be required to join and pay membership dues to an organization which uses a portion of those dues not to foster its legitimate purposes but rather to finance political and ideological ideas contrary to his or her own beliefs. We find the principle of *Abood* to be applicable and controlling because we discern no persuasive reason why lawyers should be treated differently than other public or private persons for First Amendment purposes and because we conclude that the State Bar, when acting in its administration of justice function, speaks for itself and not the State

---

<sup>10</sup> In *Chicago Teachers Union v. Hudson*, *supra*, \_\_\_ U.S. \_\_\_ [89 L.Ed.2d 232], the court adhered to the view that a dissenting employee may not be required to support financially any ideological causes not germane to the union's duties as a collective bargaining agent. (*Id.*, at p. \_\_\_ [89 L.Ed.2d at p. 244].) The court expressly declined to consider whether a dissenting employee may be required to contribute to non-germane, non-ideological expenditures. (*Id.*, at p. \_\_\_ [89 L.Ed.2d at p. 245, fn. 13].)

of California and consequently is more analogous to a labor union than to government. Indeed, as the plurality opinion in *Lathrop* forecast, the case involving an integrated bar is no different from the union-shop agreement at issue in *Hanson*. (367 U.S. at p. 842 [6 L.Ed.2d at p. 1205].)

The historical underpinnings of the practice of law do not support the defendants' position that compelled membership fees may be utilized to promote political and ideological positions unrelated to the practice of law or the administration of justice. For many years the right to practice law was regarded as a mere privilege upon which the state could place such conditions and restrictions as it saw fit. (*Cohen v. Wright* (1863) 22 Cal. 293, 323.) Indeed, in *Lathrop* at least one justice relied upon that ground. (367 U.S. at p. 865 [6 L.Ed.2d at p. 1218], concurring opinion of Whittaker, J.) That earlier view has now been thoroughly discredited. (*Konigsberg v. State Bar of California* (1957) 353 U.S. 252, 257 [1 L.Ed.2d 810, 816]; *Schwartz v. Board of Bar Examiners* (1957) 353 U.S. 232, 238 [1 L.Ed.2d 796, 801].) Our own Supreme Court has found it impossible to consider admission to the profession to be a mere privilege. (*Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 452, fn. 3.) Instead, the opportunity to practice law is a fundamental right protected by the Privilege and Immunities Clause of the federal Constitution. (*Supreme Court of New Hampshire v. Piper* (1985) \_\_\_ U.S. \_\_\_ [84 L.Ed.2d 205, 213].)

It has been equally well established that the protection of the First Amendment extends to those who are or would be lawyers. In *Baird v. Arizona* (1971) 401 U.S. 1

[27 L.Ed.2d 639], an applicant had been refused admission to the Arizona bar after she refused to answer a question concerning past associations. After the Arizona Supreme Court upheld the denial of admission, the United States Supreme Court reversed. The four justice plurality opinion noted that the First Amendment protects associational freedom and that a state cannot exclude a person from a profession solely because he is a member of a particular political organization or because he holds certain beliefs. (401 U.S. at p. 6 [27 L.Ed.2d at pp. 646-647].) The First Amendment limits a state's power to inquire into beliefs and associations and the state bears a heavy burden to show that such inquiry is necessary to protect a legitimate state interest. (*Id.*, at pp. 6-7 [27 L.Ed.2d at p. 647].) In short, "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law." (*Id.*, at p. 8 [27 L.Ed.2d at p. 647].) A fifth justice concurred because the State Bar's purpose in asking the question was to inquire into political beliefs, "[y]et the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs." (401 U.S. at pp. 9-10 [27 L.Ed.2d at pp. 648-649], concurring opinion of Stewart, J.) The same result was reached on similar facts in *Re Stolar* (1971) 401 U.S. 23 [27 L.Ed.2d 657]. Since it is clear that the associational rights of attorneys are protected by the First Amendment, and since those rights are infringed equally by compelled rather than prohibited contributions for political purposes, no plausible reason appears why *Aboud* should not apply to integrated bar associations.



Likewise, the historical underpinnings of the California integrated bar do not support the defendants' contentions. The power of the Legislature to regulate the practice of law has long been recognized. In *Ex Parte Gregory Yale* (1864) 24 Cal. 241, at page 244, the Supreme Court said with regard to attorneys: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute." When the Legislature determined to integrate the California bar, the Act was upheld on the basis that it was a reasonable exercise of the legislative power to regulate the practice of law. In *State Bar of California v. Superior Court* (1929) 207 Cal. 323, at page 334, the Court said: "When we turn to those sections of the State Bar Act which purport to invest the board of governors, or its administrative committees, with governmental functions and disciplinary powers we find that these uniformly and expressly have relation to the *practice* of the law." In *Brydonjack v. State Bar* (1929) 208 Cal. 439, at page 443, the court acknowledged that "the power of the legislature to impose reasonable restrictions upon the practice of the law has been recognized in this state almost from the inception of statehood."

The issue of compelled membership fees was upheld at an early date. In *Carpenter v. The State Bar* (1931) 211 Cal. 358, the petitioner had failed to pay his bar dues and penalties and he disclaimed liability for such payments. The Supreme Court said: "The validity of the State Bar Act as a regulatory measure under the police power

has been repeatedly upheld by this court. When that fact is conceded, it follows as a matter of course that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues." (*Id.*, at p. 360; citations omitted.) Likewise, in *Herron v. State Bar*, *supra*, 24 Cal.2d at page 64, the Court noted that the State Bar Act is valid as a regulatory measure under the police power, and that "the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues."

The legislative power to regulate a profession was explained with regard to real estate brokers and salesmen in *Riley v. Chambers* (1919) 181 Cal. 589, at pages 592-593, as follows: "Nor can it be controverted that the right to engage in a lawful and useful occupation cannot, in effect, be taken away under the guise of regulation. On the other hand, it is equally true that a lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only, is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the legislature, and whose exercise is one of the latter's most important functions." If an act is a valid regulatory measure, then reasonable fees imposed to defray the expenses attached



to the administration of the law may be imposed. (Shaffer v. Beinhorn (1923) 190 Cal. 569, 573.)

It was these authorities which the Supreme Court relied upon in upholding the integration of the State Bar, and the imposition of reasonable fees upon members. (See *Carpenter v. The State Bar*, supra, 211 Cal. at p. 360.) From these cases two principles may be derived. First, in the exercise of the police power the Legislature may validly regulate the practice of the legal profession. Second, the members of the legal profession may be charged reasonable fees to defray the costs of the regulation of the profession and the costs of implementing the State Bar Act and its purposes. Yet nowhere in these authorities is it suggested that it is within the power of either the Legislature or the State Bar to compel membership in a political organization or to require members of a profession to provide financial support for the advancement of political and ideological ideas which are unrelated to the regulation of the profession or the administration of justice.

The defendants assert that the State Bar is a public agency and that membership fees are actually taxes upon the right to practice law. They assert that the use of such fees for the advancement of political and ideological ideas is simply a case of the government adding its own voice to the many that it must tolerate, and is thus permissible under this court's decision in *Miller v. California Com. On Status of Women* (1984) 151 Cal. App.3d 693. In *Miller* we were confronted with a taxpayer suit seeking either to abolish the commission or to prohibit it from lobbying or promoting its views on measures to improve the status of women, as the Legislature had

expressly authorized. We rejected the challenge. We noted that government may no more compel someone to express a view than it may forbid someone from voicing one. Although it may not compel citizens to contribute to a nongovernmental entity for the support of political and ideological activity, this does not mean that government itself must be ideologically neutral. (151 Cal.App.3d at p. 700.) Government has legitimate interests in informing, in educating, and in persuading, and it may add its voice to the marketplace of ideas on controversial topics. (Id. at p. 701.) Nevertheless, it may not, in the guise of governmental speech, trammel the free speech rights of its citizens. (*Ibid.*)

Our decision in *Miller* is inapplicable here for two reasons. First, the commission was established by the government and authorized to speak on its behalf, but no one was forced to add his or her assent to the government's voice in advocating a belief. Second, the commission was funded by the government out of its general funds. No one was compelled to finance the government's voice as a condition of employment or the right to engage in a profession. In contrast, the State bar purports to speak on behalf of its members, and thus plaintiffs' voices are compelled to be added to those of the bar. And, of course, the plaintiffs are compelled to finance the bar's voice as a condition of engaging in their profession.

But even further, the State Bar is a unique organization which partakes of some governmental attributes and some nongovernmental characteristics. Because of its singular character, the State Bar cannot be deemed a regular state agency. As William Hamm, the Legislative Analyst,

testified before a legislative committee, "Article VI, Section IX, of the State Constitution creates the State Bar as a public corporation, and it makes Bar membership mandatory for all practicing attorneys in California. The Bar is not a regular state agency, and, as a consequence, its expenditures are not reviewed and approved by the Legislature as part of the budget process each year. The Legislature, however, does set a ceiling on the membership fees that the Bar may charge practicing attorneys. . . . [¶] The Bar is an administrative arm of the California Supreme Court in matters of admission and discipline of attorneys, the crediting and monitoring of law schools, and in regulating legal specialization. These activities are mandated by statute or court rules, and thus the Bar is required to undertake these activities. In addition to these mandatory activities, the Bar is authorized, but not required, to administer various other programs that the Bar deems necessary to advance the legal field." (Review and Briefing on Legislative Analyst Report on the State Bar, Special Legislative Investigating Committee on the State Bar, March 11, 1980.) It is this dichotomy of function that makes the State Bar "*sui generis*." (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300.) Thus for its mandatory functions, the State Bar and its officers and employees are public officers. (See e.g., *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 565-566.) But that does not make the State Bar the government or imbue it with the government's right to speak to political and ideological matters unrelated to the legal field.

It is true that the State Bar is designated a "public corporation." But as we shall endeavor to show, not all public corporations constitute government. Former Civil

Code section 284 defined a public corporation as follows: "public corporations are formed or organized for the government of a portion of the state." Thus it was that *Bettencourt v. Industrial Acc. Com.* (1917) 175 Cal. 559, at page 561, held that "[p]ublic corporations, therefore, under the controlling definition of the law are those corporations formed for political and governmental purposes and vested with political and governmental powers."<sup>11</sup> In *State Bar of California v. Superior Court*, supra, 207 Cal. 323, it was contended that the State Bar, despite its designation as such, could not be a public corporation because its purpose and function were not the "government of a portion of the state." The Supreme Court rejected that contention in this fashion: "It is to be noted in considering this contention that the constitution does not attempt to define the several sorts of corporations which may be formed by or in accordance with legislative action, but that the foregoing definition of what shall constitute public as distinguished from private corporations is purely of statutory origin. This being so it must be clear that the provisions of the Civil Code above quoted could not be held to constitute a limitation upon later legislation to create public corporations for other purposes than those relating to 'the government of a portion of the state.' It is a fact within general knowledge that the state legislature has, upon not a few occasions

---

<sup>11</sup> Although the statute has long since been repealed, this definition of a public corporation has occasionally been repeated. (See e.g., *Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal. App.3d 400, 407.)



since the adoption both of our present constitution and of the foregoing section of the Civil Code, provided for the creation of various kinds of public corporations or associations which did not have for their function or purpose the 'government of a portion of the state.' " (*Id.*, at p. 329.) Thus, while the State Bar is a public corporation, it is not a public body formed or organized for political or governmental purposes. In short, while the State Bar serves a public purpose and its officers may speak in the public interest to advance the administration of justice, it is not by that account the government. In the exercise of its administration of justice function the State Bar does not speak for the State of California or all of its citizenry. Instead, it speaks in its corporate capacity as a public corporation whose only members are attorneys licensed to practice law in California. (§ 6002.) Although its voice may advance a compelling state interest, it is nevertheless not governmental speech. Acting in its discretionary administration of justice capacity the State Bar must, therefore, be deemed a nongovernmental association. And as we noted in *Miller*, the Legislature "may not delegate the authority to a nongovernmental entity to extract funds for the support of political and ideological activity not directly related to the purpose for which the entity is given the power to levy." (*Miller v. California Com. on Status of Women*, *supra*, 151 Cal. App.3d. at p. 700.) Accordingly, the conclusion that government may add its voice to public controversies does nothing to undermine the objection to compelled membership and financial support for the political and ideological ideas alleged to have been espoused by the State Bar.

We likewise cannot accept the assertion that the membership fees required of attorneys are simply tax receipts which the government may spend as it likes. The fees do not purport to be taxes. (§ 6140.) The fees are imposed upon members of the State Bar regardless of whether they are practicing law. (§§ 6140, 6141.) The fees do not become a debt owed to the State Bar and the failure to pay them in itself cannot lead to criminal or civil actions, but only to suspension from membership in the Bar. (§ 6143.) And the fees may be waived. (§ 6141.1. See *Estate of Stanford* (1899) 126 Cal. 112, 117-120; *Doctors Hospital v. County of Santa Clara* (1957) 150 Cal.App.2d 53, 55-56.) More critical, however, is the fact that an integral part of the regulatory act is compelled membership in the State Bar. An attorney is not permitted to simply pay a license tax but decline to join the State Bar; he is required to become a member of the bar and pay membership fees. The failure to pay the fees does not directly deprive the attorney of the right to practice law; it is the suspension of membership which carries that result. (§ 6125.) It is thus clear that the fees are in fact membership fees imposed under the police power to regulate the practice of law, and as such they must be such as are reasonably necessary to pay the costs of regulation, together with the costs of aiding matters relating to the advancement of the administration of justice. (See *Herron v. State Bar*, *supra*, 24 Cal.2d at 64; *Carpenter v. The State Bar*, *supra*, 211 Cal. at 360.) To the extent such fees are used to advance political and ideological ideas unrelated to the regulation of the legal profession or the administration of justice, those fees stand on no different footing than the compelled agency-shop



fees required of Detroit's public school teachers as a condition of continued employment which were at issue in *Abood*. Because the State Bar speaks for itself rather than the state in the exercise of its discretionary administration of justice function, it is sufficiently analogous to a labor union to be treated similarly for First amendment purposes. "Certain characteristics of union organization and integrated bar organization make these two entities particularly susceptible to first amendment scrutiny. In each organization actual membership and/or compulsory financial support are required for continued employment in the particular field. Such compulsion is authorized by the state with respect to union agreements and established directly by state action regarding bar integration. Also, political and legislative activities are widespread in both entities." (Note, *First Amendment proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined*, *supra*, 22 Ariz. L. Rev. at p. 954.)

For all of these reasons, we conclude that the principles of *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209 [52 L.Ed.2d 261], apply to an integrated bar association. In so holding we note that all of the courts which have considered the question, although disagreeing on the consequences of their application, agree that the *Abood* principles apply to integrated bar associations. In *Arrow v. Dow* (1982) 544 F.Supp. 458, at pages 462-463, the United States District Court found *Abood* to be controlling in the context of the New Mexico State Bar's use of compelled membership fees for political and ideological purposes. Although declining to hold categorically that the bar was prohibited from spending bar dues for lobbying, the court concluded that "the lobbying efforts

presently under consideration were not directed to important governmental interests which would justify the infringement upon [dissenting members'] rights caused by using Bar dues to finance lobbying efforts." (*Id.*, at p. 463.) In *Schneider v. Colegio de Abogados de Puerto Rico* (1983) 565 F.Supp. 963, at page 978, the United States District Court held *Abood* to be controlling with regard to the Puerto Rican integrated bar. In a later decision the court refused to stay its judgment. (*Schneider v. Colegio de Abogados de Puerto Rico* (1983) 572 F.Supp. 957.) In *Romany v. Colegio de Abogados de P.R.* (1st Cir. 1984) 742 F.2d 32, the Court of Appeals held that in view of the fact that the Puerto Rican bar was working on a plan to avoid the use of dissenters' fees for ideological purposes, the District Court should have abstained from acting. However, the court agreed that *Abood* was applicable, and held that the District Court could properly enter an interim order to protect the dissenting members of the bar pending action by the local authorities. (742 F.2d at pp. 44-45.) In *Falk v. State Bar of Michigan* (1981) 411 Mich. 63, 305 N.W. 2d 201, at 217-218, a divided Supreme Court of Michigan, unable to agree upon a decision, remanded the case for an additional evidentiary hearing to develop the record concerning the bar's activities. Nevertheless, all the justices agreed that the *Abood* principles applied to the integrated bar of Michigan. Finally, our attention has been called to a decision of the Supreme Court of Florida refusing to amend its integration rule. (*The Florida Bar* (1983) 439 So.2d 213.) In that decision the court held that the improvement of the administration of justice and the advancement of the science of jurisprudence are compelling state interests.

Citing *Abood*, the court concluded that those interests may be advanced by any means that are "germane" to that interest.<sup>12</sup> (*Ibid.*)

### III

Our conclusion that the constitutional restrictions of *Abood* govern an integrated bar association leaves open the question of the scope of the activities in which the State Bar may engage without violating the First Amendment. We turn now to that question.

#### A

Lawyers do not surrender their First Amendment rights by joining the State Bar. Members of the bar, no less than other persons, maintain their constitutional rights of free speech and association. But as is the case with other persons, those constitutional rights are not absolute. (*Roberts v. United States Jaycees*, *supra*, \_\_\_ U.S. \_\_\_, \_\_\_ [82 L.Ed.2d at p. 475]; *C. S. C. v. Letter Carriers* (1973) 413 U.S. 548, 567 [37 L.Ed.2d 796, 814]; *Konigsberg v. State Bar of California*, *supra*, 366 U.S. at p. 49 [6 L.Ed.2d at p. 116].) Even protected First Amendment rights may be impinged upon "if the State demonstrates a sufficiently important interest." (*Buckley*

<sup>12</sup> The Florida court further concluded that the political activities of the bar were germane to those compelling state interests. On this point, we disagree. As we explain in the text, purely political activities, such as engaging in election campaigning, cannot fairly be construed to relate to the administration of justice and hence cannot be characterized as being germane to the permissible activities of the State Bar.

*v. Valeo* (1976) 424 U.S. 1, 25 [46 L.Ed.2d 659, 691].) But to justify such a constitutional intrusion, the state must demonstrate a compelling governmental interest. (*Cousins v. Wigoda* (1975) 419 U.S. 477, 489 [42 L.Ed.2d 595, 604]; *National Asso. For the A. C. P. v. Alabama*, *supra*, 357 U.S. at p. 463 [2 L.Ed.2d at p. 1500].)

Few would deny that the state has a compelling interest in promoting the improvement of the administration of justice and the advancement of jurisprudence. Clearly there is such a compelling, indeed even a paramount, interest. As Justice Williams powerfully recounted in his opinion in *Falk v. State Bar of Michigan*, *supra*, 411 Mich. 63, 305 N.W.2d at p. 228: "The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy. [¶] As officers of the court, lawyers play an indispensable role in the administration of justice. The state must not only protect its legal machinery from abuse through such safeguards as the attorney grievance procedure but must also be mindful of the competence of attorneys, who are in a position to best assist, or most impede, the general public in securing justice. Authorizing the State Bar to aid the state in promoting improvements in the administration of justice is essential for the state's continued existence." We similarly conclude that the State Bar's statutory authorization "to aid in all matters pertaining to the advancement of the science of jurisprudence or to the



improvement of the administration of justice" embodies a compelling governmental interest.<sup>13</sup>

We also believe it is indisputable that the state has a sufficiently compelling interest in the regulation of attorneys to warrant an integrated bar. "The adequate protection of public interests, as well as inherent and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business." (*In re Galusha* (1921) 184 Cal. 697, 698.) The state's answer to this compelling need was to create an integrated bar which is largely self-governing and which provides essential assistance to the state in regulating and supervising the profession. (See *State Bar of California v. Superior Court*, *supra*, 207 Cal. 323.) Although an integrated bar constitutes a significant impingement upon the First Amendment rights of lawyers, that impingement is amply justified by the compelling governmental interest in the regulation of the legal profession. In *Abood*, the compelling governmental interest fostered by Congress was the maintenance of labor-management peace through union collective bargaining.

---

<sup>13</sup> Jurisprudence, by definition, is "[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations." (Black's Law Dict. (5th ed. 1979) p. 767.) The administration of justice, on the other hand, relates to the adjudication or adjustment of rights and duties in a legal system. It is concerned with how a legal system is managed and conducted. "Administration is an exercise of power in a concrete situation for the accomplishment of private or public purposes." (Bodenheimer, *Jurisprudence, the Philosophy and Method of the Law* (Rev. ed. 1974) § 61. p. 284.)

Here the compelling state interests advanced by the Legislature are the regulation of attorneys and the improvement and advancement of jurisprudence and the administration of justice. Those functions constitute the State Bar's *raison d'être* and form the framework against which the constitutional challenge must be judged.

## B

In determining the scope of activities in which an integrated state bar may be permitted to engage, we apply the test set forth in *Ellis v. Railway Clerks*, *supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d 428]. There, in the context of a union-shop, the Supreme Court examined the First Amendment limitations upon the activities which a union can support with funds extracted from dissenters. (*Id.*, at p. \_\_\_ [p. 446].) Analogous limitations apply to integrated bar associations.

When the activity of the State Bar is clearly germane to either its regulatory or administration of justice function and that activity does not involve political or ideological causes, no constitutional barrier prohibits it. "At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.'" (*Ellis, supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 447], citation omitted.) Thus, for example, when the State Bar expends funds for the discipline of attorneys (§ 6040 et seq.) or to assist the Law Revision Commission (Gov. Code, § 10307), no First Amendment restrictions preclude those expenditures.



At the other extreme, the State Bar may not constitutionally use compelled dues for the support of ideological or political causes not germane to its two statutory purposes. Once again the analogy to the union-shop is apt: "The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." (*Ellis, supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 441].)

The more difficult question arises when the expenditure of the State Bar is for an activity which relates to its statutory purposes in some fashion but also implicates additional First Amendment concerns.<sup>14</sup> In that case the critical issue is whether the challenged expenditure is sufficiently related to the State Bar's statutory functions to justify its imposition upon objecting members. This requires, in the case of unions, that a line be drawn "between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on

---

<sup>14</sup> In *Chicago Teachers Union v. Hudson* (1986) \_\_\_ U.S. \_\_\_, [89 L.Ed.2d 232] the high court found "it unnecessary to resolve any question concerning non-germane, non-ideological expenditures." (*Id.*, at p. \_\_\_, fn. 13 [89 L.Ed.2d at p. 245, fn. 13].) We also find it unnecessary to reach that issue. It is possible for the State Bar, with the use of compelled dues, to engage in conduct which exceeds its statutory authorization but which does not advance any political, ideological or other free speech and associational interest. Since the State Bar has no power to act in matters unrelated to its statutory purposes, we need not decide whether the First Amendment also bars any ultra vires act with compelled membership dues.

dissenters." (*Ibid.*) A similar line must be drawn for the State Bar. The dividing line depends upon "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." (*Id.*, at p. \_\_\_ [p. 447].) In drawing that line it must be recalled that "by allowing the union shop at all, [the Supreme Court has] already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." (*Id.*, at p. 446.)

The test applied in *Ellis* consists of balancing the *additional* interference with First Amendment rights which such a challenged activity entails against an asserted governmental interest. Thus some activities which would not be permissible standing alone may nonetheless be allowed because they do not increase the infringement already resulting from the compelled, but justified, extraction. (*Ibid.*) The dissenters "may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." (*Id.*, at p. \_\_\_ [p. 447].) Other activities may raise more serious First Amendment concerns but may be permissible because the additional interference is supported by a sufficient governmental interest. (*Ibid.*) This governmental interest need not be sufficient to support the total infringement; it need only be sufficient to justify the additional infringement that the expense entails. (*Ibid.*)

## C

We now apply the *Ellis* test to the activities challenged here. Some of the challenges can be resolved on the record before us. Others lack an adequate record and in keeping with the position taken by the *Abood* court, we decline to attempt to divine precise lines for those challenged expenditures in an evidentiary vacuum. Instead, as to those expenditures, we undertake only to set the broad perimeter around which the line must be drawn in light of the challenge.

Plaintiffs specifically challenge the State Bar's use of membership fees to underwrite the cost of lobbying the Legislature, filing amicus curiae briefs in selected cases, holding meetings of the Conference of Delegates, disseminating the speeches of its former president and establishing a public information program concerning election of justices. We consider those challenges in order.

1. Lobbying. In the agency shop context, it has been held that the propriety of lobbying activities with compelled contributions depends upon the nature of the lobbying. For example, in *Robinson v. State of New Jersey* (3rd Cir. 1984) 741 F.2d 598, at page 609, the court said: "So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees." On the other hand, in *Beck v. Communications Workers of America (C.W.A.)* (4th Cir. 1985) 776 F.2d 1187, at pages

1210-1211, a union's lobbying expenditures with non-member fees were disallowed because some of those efforts ran far afield from the purposes of collective bargaining, and because the union made no effort to distinguish proper from improper lobbying activities. The court indicated, however, that some lobbying activities may be relevant to collective bargaining and hence may be proper.

In like fashion the State Bar may, without objection, engage in lobbying activities which are germane to its two statutory purposes. Since the State Bar is empowered to do all acts necessary or expedient for the attainment of its purposes (§ 6001, subd. (g)), the means it employs are generally not in issue. Thus the bar may elect to lobby the Legislature in order to promote the passage of laws which improve the administration of justice or which relate to the regulation and supervision of attorneys. But it is apparent that not all legislation is germane to the administration of justice or the regulation of the bar. A bill to create a new airport district, for example, does not relate to the administration of justice. It is equally obvious that the bar's right to lobby is not limited to procedural, as opposed to substantive, changes in the law. Not all improvements and advancements can be made by procedural changes. Thus, it is not lobbying per se that transgresses the constitutional line. Rather the question is whether the lobbying concerns matters relating to the State Bar's statutory functions. Lobbying activities to improve the administration of justice may relate to legislation which also has ideological overtones and may therefore arguably constitute some limited additional



infringement of the First Amendment rights of lawyers. In that case, the question is whether there is an "additional infringement of First Amendment rights beyond that already accepted, and . . . that is not justified by the governmental interests behind the [integrated bar] itself." (*Ellis, supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 447].) Consequently, the validity of particular lobbying expenditures must be determined upon an adequate evidentiary record, keeping in mind that it is the Bar which bears the burden of proving the validity of its lobbying expenditures. (*Beck v. Communications Workers of America (C.W.A.)*, *supra*, 776 F.2d at p. 1211; see also *Chicago Teachers Union v. Hudson*, *supra*, \_\_\_ U.S. \_\_\_ [89 L.Ed.2d at p. 246].)

2. Amicus Curiae Briefs. Litigation expenses stand on the same footing as lobbying expenses. This much was recognized in *Ellis* where the court held that litigation expenses not having a direct connection with the bargaining unit may not be charged to objecting employees. The court acknowledged, nevertheless, that some litigation expenses are clearly chargeable to such employees as a normal incident of the duties of the union as the exclusive representative. By a parity of reasoning, the state's interest in the improvement of the administration of justice is sufficient to warrant the bar's participation in litigation which may affect the administration of justice. After all, a precedential judicial decision establishes the law of this state just as surely as a statutory enactment. Yet, it is apparent that not all lawsuits, simply because they are filed in a court, involve the administration of justice. The suit may only involve private litigants fighting over a personal dispute about which the State Bar

could not conceivably have a legitimate interest. The bar consequently cannot indiscriminately file amicus curiae briefs in lawsuits or otherwise engage in litigation. Thus, the resolution of the issue, once again, depends upon a proper record.

3. Conference of Delegates. The propriety of the meetings of the Conference of Delegates is also resolved by the decision in *Ellis*. There, with respect to union conventions, the court declared: "We have very little trouble in holding that [non-union employees] must help defray the costs of these conventions. Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions . . . seem to us to be essential to the union's discharge of its duties as bargaining agent." (*Id.* at p. \_\_\_ [80 L.Ed.2d at p. 442].) It is true that conventions have a "direct communicative content and involve the expression of ideas" and consequently implicate additional First Amendment concerns. (*Id.*, at p. \_\_\_ [80 L.Ed.2d at p. 447].) "Nonetheless, we perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." (*Ibid.*) The meetings of the Conference of Delegates serve much the same function as union conventions. Much of the bar's efforts with respect to its litigation and lobbying activities have originated with the Conference of Delegates. We have previously noted that the conference has occasionally strayed from the bar's regulatory and



administration of justice functions, but that does not preclude the use of objecting members' dues altogether. So long as the Conference of Delegates serves the State Bar's statutory functions, the bar may properly use compelled dues to support that portion of the conference's activities.

4. Speeches of the President. Plaintiffs do not object to the publication of the president's speeches in general. Rather they object to the publication of former president Anthony Murray's speeches and viewpoints in 1982. We have recounted the essence of those speeches and viewpoints and suffice it say here that he adopted a specific position about a public election and compulsory bar dues were used to advocate that position. We agree with plaintiffs that the challenged expenditures were improper.

The Constitution of California, article VI, section 16, subdivision (a) provides in relevant part: "Judges of the Supreme Court shall be elected at large and judges of the courts of appeal shall be elected in their districts at general elections at the same time and place as the Governor." Thus the Constitution leaves the election of appellate court judges to the "free election" of the People. (Cal. Const., art. II, § 3; see *Stanson v. Mott* (1976) 17 Cal.2d 206, 218.) The right to participate in a free election is the most precious right our system of government accords its citizens for without it other rights, even the most basic, are illusory. (*Williams v. Rhodes* (1968) 393 U.S. 23, 31 [21 L.Ed.2d 24, 31].) Indeed, the First Amendment finds its fullest and most urgent application precisely in the conduct of political campaigns. (*Patriot Co. v. Roy* (1971) 401 U.S. 265, 272 [28 L.Ed.2d 35, 41].) Our state Supreme Court has recognized the overriding importance of free elections to the people of California. "[W]e examine with

a close and questioning attention every intrusion, subtle or direct, which impairs or affects the unconditional exercise of these perogatives." (*Johnson v. Hamilton* (1975) 15 Cal.3d 461, 469; see also *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 714; *Stanson v. Mott*, supra, 17 Cal.3d at pp. 218-219.) These principles apply whether the issue presented at the free election of the people is partisan or nonpartisan. (*Galda v. Rutgers* (3rd Cir. 1985) 772 F.2d 1060, 1064. See also *Stanson v. Mott*, supra, 17 Cal.3d at pp. 217-218; *First National Bank of Boston* (1978) 435 U.S. 765, 785-786 [55 L.Ed.2d 707, 723].) In fact, it was precisely this type of "political" activity which was condemned in an agency shop situation in *Abood*. (431 U.S. at p. 235 [52 L.Ed.2d at p. 284].)

It is apparent from these authorities that the use of compelled fees for election campaigning is not merely a slight additional impingement on First Amendment rights; it is a substantial additional interference, resulting in the most grievous infringement possible. It is doubtful that any governmental interest can justify such an infringement, but the interests asserted here, substantial though they may be, do not.<sup>15</sup>

---

<sup>15</sup> Nor do we find legislative authorization for the bar to engage in such political activities. *Stanson v. Mott*, supra, 17 Cal.3d 196, involved a different, but related, situation. There the director of the state parks department authorized the department to expend \$5,000 to promote the passage of an election bond measure to provide funds for the acquisition of park land. In a challenge to the use of departmental funds for election campaigning, the Supreme Court noted the serious

(Continued on following page)

We also must reject defendants' contention that these publications were simply a "public education program." In *Stanson v. Mott*, supra, 17 Cal.3d 206, the court recognized that the fair presentation of relevant information does not necessarily constitute election campaigning even though the information may relate to an election issue. (*Id.*, at p. 221.) The propriety of the expenditure depends upon the style, tenor and timing of the publication and whether it appears that the publication was designed primarily for the purpose of influencing the voters at an election. (*Id.*, at p. p.222, esp. fn. 8.) In light of the record before us, defendants' claim that they were merely educating the public borders on the specious. Murray's position, and the bar's project adopted to support that position, were both designed for the expressed purpose of influencing the voters. Defendants adopted a position on how and why the electors should cast their votes and then campaigned to convince the electorate to follow that

---

(Continued from previous page)

constitutional questions such expenditures raised, both from the standpoint of distortion of the democratic electoral process and from the standpoint of using public funds, to which objecting electors had an equal right, to advocate a position contrary to their beliefs. (17 Cal.3d at pp. 216-217; see also *Mines v. Del Valle* (1927) 201 Cal. 273, 287.) The court found it unnecessary to resolve the constitutional questions, however, because it held that legislative authorization for the use of public funds for election campaigning cannot be implied but must be given in clear and unmistakable language. (*Id.*, at p. pp. 219-220. See also *International Machinists v. Street*, supra, 367 U.S. at pp. 768-769 [6 L.Ed.2d at pp. 1160-1161].) These same considerations are applicable here and we decline to find legislative authorization for the use of compulsory bar dues for election campaigning in the absence of clear and unmistakable language to that effect. Since election campaigning is not statutorily authorized, it is not germane to the statutory purposes of the State Bar.

position. The bar's campaign included efforts to disparage the position, personalities and motives of members and others who held and urged opposite views. This was election campaigning pure and simple and no compelling governmental interest justified it. These publications violated the First Amendment rights of dissenting members of the bar.

5. Public Education Programs. As with the objection to the publication of the president's speeches and views, the plaintiffs do not challenge public education programs in general. They challenge only the specific 1982 program designed to influence judicial elections. This limited attack is well advised, for public informational programs will often be an important means by which the State Bar advances its statutory functions.<sup>16</sup> Still, the bar may not engage in election campaigning in the guise of disseminating information to the public. What we said with respect to the president's activities is equally applicable here. Parts of the bar's 1982 public education program were clearly election campaigning and the use of compulsory dues for that political purpose breached the constitutional barriers erected by the First Amendment.

---

<sup>16</sup> As we have noted elsewhere in the margin, the Board of Governors of the State Bar is statutorily authorized to aid "such matters as concern the relations of the bar with the public." (§ 6031, subd. (a).) In furtherance of that purpose or its other statutory purposes the State Bar may engage, subject to the First Amendment constraints delineated in the text, in public information programs.



## D

But within the perimeters of its statutory purposes and the confines of the First Amendment the State Bar is entitled to use compelled membership dues even though some members may object to the manner of their use. The State Bar, after all, is not just a trade union. Under its statutory mandate, the State Bar bears a special public responsibility and is endowed with a commensurate right to speak in the public interest on matters in aid of the improvement of the administration of justice. The touchstone is the germaneness, not the popularity, of its acts. The broad lines of germaneness are easy to sketch and some of them we have already sketched. Whether our state constitution should be amended to provide for less than 12 jurors clearly relates to the administration of justice; whether the federal government should adopt an economic policy of balanced budgets does not. Naturally, the fine lines are more difficult to draw. All line drawing, at the fringes, bears some stamp of arbitrariness. As the fineness of the distinctions becomes more pronounced, the path of the boundary becomes less distinct. Because of that inherent obstacle to perfect demarcations, no doubt, in the words of Justice Holmes, "some play must be allowed for the joints of the machine" of the State Bar. (*Missouri, K. & T. R. Co. v. May* (1904) 194 U.S. 267, 270; see also *Ellis v. Railway Clerks*, supra, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at 447].) For all that, there are lines to be drawn and boundaries to be respected. Contrary to its position asserted here, the State Bar does not have plenary power to rove about to right every wrong and speak to every issue. Just as it is not a trade union, neither is the State Bar a public ombudsman.

But when the State Bar does act within the confines of its statutory functions, the fact that some of its members may disagree with its actions is not constitutionally relevant. Analytically, the State Bar's statutory functions are comparable to the collective bargaining functions of a union that were considered in *Abood*. As the *Abood* court noted, "[t]o compel employees financially to support their collective-bargaining representatives has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson and Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (*Abood v. Detroit Board of Education*, supra, 431 U.S. 209, 222, fn. omitted.) By the same token, plaintiffs and other members may have philosophical objections to specific activities undertaken by the State Bar. But so long as



those activities are consistent with the bar's statutory purposes and do not impose additional infringements on the First Amendment rights of dissenters which are not justified by a compelling governmental interest, the State Bar is free to engage in them.

But the lynchpin of the bar's position, that it is government entitled to speak politically and ideologically, must fall and with it the favorable summary judgment. The State Bar has not demonstrated that there is no triable issue on whether it has engaged in political and ideological activities unrelated to its statutory purposes, or if germane, which do not impose additional infringements on the First Amendment rights of objecting members.

To the extent that plaintiffs establish in further proceedings that the State Bar has used compelled membership fees in excess of the statutory authority granted to it, or in violation of the principles of the First Amendment, they will be entitled, at the least, to declaratory relief. To the extent they establish that funds are spent in excess of statutory authority they will also be entitled to injunctive relief to prevent future expenditures. (*Stanson v. Mott*, supra, 17 Cal.3d at p. 223.) The First Amendment, however, does not require that the defendants be enjoined from future expenditures. The State Bar may expend funds for activities which are germane to its statutory purposes even though the expenditures, if funded by dues of dissenting members, would transgress First Amendment limitations. The constitution only requires that these transgressing expenditures not be financed with the compulsory dues of those who object. (*Abood*, supra, 431 U.S. at pp. 235-246 [52 L.Ed.2d at pp. 284-285].)

The remedy for such a situation, if the State Bar desires to engage in those activities, is to provide a scheme whereby the dissenting members are not required to finance the political or ideological activities of the State Bar. (*Chicago Teachers Union v. Hudson*, supra, 89 L.Ed.2d 232; *Ellis*, supra, 80 L.Ed.2d at p. 439; *Abood*, supra, 431 U.S. at p. 237, fn. 35.)

#### IV

We finally consider the propriety of the summary judgment in favor of the individual defendants. Plaintiffs sought to hold the members of the Board of Governors liable for amounts expended for improper purposes after September 12, 1982. The trial court found that plaintiffs failed to show that the board members did not use due care, and that the supporting papers showed that they acted in good faith. Summary judgment was therefore granted in favor of the individual defendants.

We first hold that the individual defendants may not be held responsible for expenditures which are authorized by statute but which impermissibly impinge upon plaintiff's First Amendment rights under *Abood* and *Ellis*. This is so because, as we have noted, the Constitution does not forbid such expenditures; it only requires that they not be financed with the compulsory dues of the dissenters. Accordingly, the individual defendants cannot be required to reimburse the bar for such expenditures, although the bar may be required to provide a remedy to the plaintiffs.

The individual defendants may be held, upon a proper showing, to reimburse the State Bar for expenditure of funds which are in excess of the bar's statutory powers.<sup>17</sup> In moving for summary judgment the individual defendants asserted, in their points and authorities,

---

<sup>17</sup> Perhaps due to the unique nature of the State Bar and this litigation, the parties have assumed that the standard set forth in *Stanson v. Mott*, supra, 17 Cal.3d at page 223, is controlling. There the Supreme Court held that a public official who authorizes the improper expenditure of public funds is personally liable for the repayment of those funds if he failed to exercise due care in permitting the expenditure, regardless whether he acted in good faith. In determining whether the official acted with due care all of the circumstances must be considered, including whether the expenditure's impropriety was obvious, whether the official was alerted to the possible invalidity of the expenditure, and whether the official relied upon legal advice or the presumed validity of a legislative enactment or a judicial decision. (17 Cal.3d at p. 227.) Defendants have maintained that this is simply a case of the government adding its voice to those it must tolerate, and if that claim were accepted it would follow that the individual defendants are public officials within the meaning of *Stanson v. Mott*. However, we have rejected the claim that the bar speaks for the government. Although the members of the board of governors have been held to be public officials in performing their mandatory function of regulating the practice of law (*Chronicle Pub. Co. v. Superior Court*, supra, 54 Cal.2d at p. 566; *Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 671), it is not clear that they are public officials with respect to the bar's discretionary administration of justice function. This raises a question of the appropriate standard to apply in determining whether the individual defendants may be held liable for repayment of unauthorized expenditures. (Compare Corp. Code, § 309 [under general corporation law a director is not liable if he acts in good faith and with such care, including

(Continued on following page)

that they had acted in good faith and that the plaintiffs had not shown that they had not. This was an insufficient showing to support summary judgment in favor of the individual defendants. The fact that the defendants may have authorized unlawful expenditures raises an issue as to their good faith and exercise of due care in doing so. In order to support summary judgment the defendants were required to present affidavits, declarations, and other supporting papers which would show that there is no triable issue of fact and that they were entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (b), (c).) The defendants bore the burden of furnishing supporting documents that established that all the claims of the plaintiffs were entirely without merit on any legal theory. (*Lipson v. Superior Court*, supra, 31 Cal.3d 362, 374.) Mere conclusory allegations are insufficient. (*de Echeguren v. de Echeguren* (1962) 209 Cal.App.2d 141, 146.) And this is particularly so where the conclusory allegations are contained in points and authorities and are unsupported by affidavits, declarations, or other appropriate supporting papers. Defendants failed to establish by competent evidence that they

---

(Continued from previous page)

reasonable inquiry, as an ordinarily prudent person would use in similar circumstances]; *Malone v. Superior Court* (1953) 40 Cal.2d 546, 551 [officer of an unincorporated association or a nonprofit corporation is to be treated the same as a public officer for purposes of an accounting upon improper handling of the association funds].) In this appeal the parties have not briefed or argued the issue of the standard to be applied in determining the liability of the individual defendants and we therefore do not reach that issue.



acted in good faith as a matter of law, and consequently they were not entitled to summary judgment in their favor.

The judgment is reversed and the cause is remanded for further proceedings in accordance with the views expressed in this opinion. (CERTIFIED FOR PUBLICATION.)

SPARKS, J.

I concur:

CARR, J.

I concur in the judgment and in much of the opinion of the court. I write separately to emphasize the State Bar's heavy burden on remand of proving a constitutionally permissible justification for using compelled membership dues to support political or ideological causes, even though such activities may be related in some way to the Bar's statutorily conferred powers. The forced subsidization of political or ideological causes inevitably involves additional First Amendment intrusions on the rights of objecting attorneys beyond those already countenanced by compelled membership in an integrated bar. Determination of constitutional adequacy of the governmental interest required to justify the additional intrusion (see *Ellis v. Railway Clerks* (1984) 466 U.S. 435 [80 L.Ed.2d 428, 447]) necessarily implicates the means employed to serve that interest. As stated in *Roberts v. United States Jaycees* (1984) \_\_\_ U.S. \_\_\_ [82 L.Ed.2d 462, 475] and reiterated in *Chicago Teachers Union v. Hudson* (1986) \_\_\_ U.S. \_\_\_ [89 L.Ed.2d 232, 245,

fn. 11], infringements on the right to associate for expressive purposes "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, *that cannot be achieved through means significantly less restrictive of associational freedoms.*" (Emphasis added.) Thus even when pursuing a legitimate governmental interest, the means chosen must be " 'least restrictive of freedom of belief and association' " (*Chicago Teachers Union*, supra, \_\_\_ U.S. at p. \_\_\_ [89 L.Ed.2d at p. 245, fn. 11], quoting *Elrod v. Burns* (1976) 427 U.S. 347, 363 [49 L.Ed.2d 547, 559]).

As does the court, I conclude that the record establishes beyond dispute that the use of compelled membership dues specifically to publicize the speeches and views of the State Bar President in 1982 and generally to engage in election campaigning in the guise of a program of public education is clearly a violation of the constitutional rights of objecting members. Furthermore, I agree that performance of the strictly regulatory functions of the bar does not violate the constitutional rights of any member. Beyond that, however, because of the inadequacy of the evidentiary record on appeal, I believe it is premature to speculate on the kinds of activities financed by compulsory bar dues which do not impermissibly infringe upon the First Amendment rights of objecting members.

PUGLIA, P.J.



APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE  
COUNTY OF SACRAMENTO

DATE MAR. 19, 1984, COURT MET AT ---  
DEPARTMENT 9

PRESENT HON. HORACE E. CECCHETTINI, JUDGE  
T.K. RIVERA DEPUTY CLERK

\_\_\_, REPORTER \_\_\_ BAILIFF

---

EDDIE KELLER, et al.

vs

STATE BAR OF  
CALIFORNIA, et al.

---

COUNSEL:

ANTHONY T. CASO

HERBERT M. ROSENTHAL  
ROBERT S. THOMPSON

(Underline counsel present)

---

NATURE OF PROCEEDINGS: DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT, OR, IN ALTER-  
NATIVE, FOR SUMMARY ADJUDICATION OF ISSUES,  
OR FOR JUDGMENT ON THE PLEADINGS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT

COURT'S RULINGS

On October 25, 1982, four Plaintiffs filed the complaint herein against the State Bar of California and its Board of Governors seeking injunctive relief, mandate, declaratory relief and partial recovery of monies paid by way of dues. On November 18, 1982, and January 14, 1983, amendments adding additional plaintiffs were filed. The original answer was filed on January 21, 1983, and an amended answer on March 29, 1983, each admitting some

factual allegations but denying Plaintiffs' claims. A demurrer to the third affirmative defense was sustained without leave to amend. The motion for a preliminary injunction was denied on March 4, 1983.

On November 22, 1983, Defendants moved for summary judgment with alternative requests for summary adjudication and judgment on the pleadings. Plaintiffs filed a motion for "Partial Summary Judgment" on November 23, 1983.

While urging different theories, the complaint herein essentially alleges that Plaintiffs are required to be members of the defendant State Bar Association, which is administered by the individual Defendants; that the State Bar collects dues from them, but uses part of the monies for political and ideological causes in violation of Plaintiffs' First Amendment rights; that Plaintiffs disagree with the espoused causes; and that the individual Defendants are allegedly liable for return of certain monies used to promulgate the same.

The State Bar is a governmental agency authorized to do the acts which Plaintiffs find objectionable. Express constitutional or statutory sanction does not exist for each of said activities, but by necessary implication that result must be reached. The First Amendment is no bar to these activities, and it is clear that the State Bar acts strictly within the laws and rules which safeguard the participatorial rights of all members. Moreover, Plaintiffs failed to show that the Board member Defendants did not use "due care" within the standards set forth in *Stanson v. Mott*; 17 Cal.3d 206. The evidence is that they acted in good faith. Under these circumstances, there is no triable

issue, and the motion for summary judgment by all defendants is granted. The motion by Plaintiffs is denied. The Court overrules the evidentiary and other objections by Plaintiffs.

cc-mailed to each above named counsel this date

BOOK 9	MINUTES	PAGE 795
	JOYCE RUSSELL SMITH,	
	CLERK	
CC 1b	By <u>/s/ T.K. Rivera</u>	Deputy
ACTION NO. 307168		

---

(2)  
No. 88-1905

Supreme Court, U.S.

FILED

JUN 21 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court  
OF THE  
United States**

OCTOBER TERM, 1988

**EDDIE KELLER, ET AL  
V.  
STATE BAR OF CALIFORNIA, ET AL**

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF CALIFORNIA**

**RESPONDENTS' BRIEF IN OPPOSITION**

**HERBERT M. ROSENTHAL  
\*DIANE YU  
555 FRANKLIN STREET  
SAN FRANCISCO, CALIFORNIA  
(415) 561-8200  
\*Counsel of Record**

**HUFSTEDLER, MILLER, KAUS  
& BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
JUDITH R. STARR  
355 South Grand Avenue  
45th Floor  
Los Angeles, California  
(213) 617-7070  
*Attorneys for Respondents***



## TABLE OF CONTENTS

	<u>Page</u>
I.	
SUMMARY OF ARGUMENT .....	1
II.	
STATEMENT OF THE CASE .....	4
III.	
REASONS FOR DENYING THE WRIT .....	7
A. There Is No Conflict With Other Decisions ..	7
B. The Only Federal Question Implicated By The California System Has Long Been Settled ...	11
1. The First Amendment Does Not Restrain Government Speech Rationally Related To A Legitimate Governmental End .....	11
2. All Government Speech Is Subject To The Same Standard Regardless Of The Source Of The Revenue Spent .....	13
C. This Court Should Not Reach Out To Take A Case So Dependent On Issues Of State Law	14
IV.	
CONCLUSION .....	16
APPENDIX A .....	A-1
California Statutes	
APPENDIX B .....	B-1
Motion For Summary Judgment and Brief in the Superior Court	
APPENDIX C .....	C-1
Brief in the Court of Appeal	
APPENDIX D .....	D-1
Brief in the California Supreme Court	

## TABLE OF AUTHORITIES CITED

## Cases

	<u>Page</u>
<i>Aboud v. Detroit Board of Education</i> , 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) .....	3, 6, 9, 13
<i>American Party of Texas v. White</i> , 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974) .....	12
<i>Arrow v. Dow</i> , 544 F. Supp. 458 (D.N.M. 1982) ..	7, 8
<i>Autenrieth v. Cullen</i> , 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036, 25 L.Ed.2d 647, 90 S.Ct. 1353 (1970) .....	9
<i>Petition of Chapman</i> , 509 A.2d 753 (N.H. 1986) ..	7, 8
<i>Chronicle Publishing Co. v. Superior Court</i> , 54 Cal.2d 548, 7 Cal.Rptr. 109 (1960) .....	5
<i>Ellis v. Brotherhood of Railway, Airline &amp; Steamship Clerks</i> , 466 U.S. 435, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984) .....	13
<i>Engel v. McCloskey</i> , 92 Cal.App.3d 870, 155 Cal.Rptr. 284 (1979) .....	5
<i>Erzinger v. Regents of the University of California</i> , 137 Cal.App.3d 389, 187 Cal.Rptr. 164 (1982) cert. denied, 462 U.S. 1133, 77 L.Ed.2d 1368, 103 S.Ct. 3114 (1983) .....	14
<i>FCC v. League of Women Voters of California</i> , 468 U.S. 364, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984)	12
<i>Garner v. Teamsters Local 776</i> , 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953) .....	11
<i>Gibson v. Florida Bar</i> , 798 F.2d 1564 (11th Cir. 1986) .....	7, 8
<i>Hollar v. Government of the Virgin Islands</i> , 857 F.2d 163 (3d Cir. 1988) .....	7, 8

## TABLE OF AUTHORITIES CITED

## CASES

	<u>Page</u>
<i>Keller v. State Bar of California</i> , 47 Cal.3d 1152, 255 Cal.Rptr. 542 (1989) .....	6, 7
<i>Lathrop v. Donahue</i> , 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961) .....	15
<i>Levine v. Heffernan</i> , 864 F.2d 457 (7th Cir. 1988)	8
<i>Michigan v. Long</i> , 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983) .....	2, 11
<i>Miller v. California Commission on Status of Women</i> , 151 Cal.App.3d 693, 198 Cal.Rptr. 877, appeal dismissed for want of jurisdiction, 469 U.S. 1133, 83 L.Ed.2d 15, 105 S.Ct. 64 (1984) .....	12, 13
<i>Regan v. Taxation with Representation of Washington</i> , 461 U.S. 609, 76 L.Ed.2d 129, 103 S.Ct. 1997 (1983) .....	12
<i>Romany v. Colegio de Abogados de Puerto Rico</i> , 742 F.2d 32 (1st Cir. 1984) .....	7
<i>Standard Oil Co. of California v. Johnson</i> , 316 U.S. 481, 86 L.Ed. 1611, 62 S.Ct. 1168 (1942) .....	2
<i>Stanson v. Mott</i> , 17 Cal.3d 206, 130 Cal.Rptr. 697 (1976) .....	6, 10, 14
<i>State Bar of California v. Superior Court</i> , 207 Cal. 323, 278 P. 432 (1929) .....	6
<i>United States v. Lee</i> , 455 U.S. 252, 71 L.Ed.2d 127, 102 S.Ct. 1051 (1982) .....	13, 14
<b>United States Constitution</b>	
United States Constitution, First Amendment .....	3, 8, 9, 11, 14, 15

## TABLE OF AUTHORITIES CITED

	<u>Page</u>
<b>California Constitution</b>	
California Constitution, Article VI, Sec. 9 .....	4
<b>Statutes</b>	
<b>Federal</b>	
Labor Management Relations Act, 29 U.S.C. § 141	11
National Labor Relations Act, 29 U.S.C. § 151 ...	11
Railway Labor Act, 45 U.S.C. § 151 .....	11, 13
<b>State</b>	
California Business & Professions Code	
Sec. 6000, <i>et seq.</i> .....	4
Sec. 6013.5 .....	5
Sec. 6031(a) .....	4
Sec. 6031(b) .....	5, 9
Sec. 6046 .....	4
Sec. 6140.1 .....	5
Sec. 6140.2 .....	5
Sec. 6140.35 .....	5
Sec. 6140.5 .....	4
Sec. 6200 .....	4
Government Code	
Sec. 8287 .....	4
Sec. 68725 .....	4
<b>Rules</b>	
Rules of the Supreme Court	
Rule 17(b) .....	7
Rule 17(c) .....	11, 14

## TABLE OF AUTHORITIES CITED

	<u>Page</u>
<b>Treatises</b>	
P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, <i>Hart &amp; Wechsler's The Federal Courts and the Federal System</i> (3d ed. 1988) .....	15
L. Tribe, <i>American Constitutional Law</i> (2d ed. 1988) .....	14



No. 88-1905

# **In the Supreme Court**

OF THE

**United States**

OCTOBER TERM, 1988

EDDIE KELLER, ET AL

VS.

STATE BAR OF CALIFORNIA, ET AL

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF CALIFORNIA**

**RESPONDENTS' BRIEF IN OPPOSITION**

**I.**

## **SUMMARY OF ARGUMENT**

The California Supreme Court conducted a careful analysis of the constitutional status and legislative structure of the State Bar of California, and found that California law envisions the State Bar as a state governmental agency, subject to the statutory and judicially-developed limitations on government speech. The California Supreme Court based its characterization of the State Bar purely on state law, in particular the unique structure of the State Bar and its place in California's governmental system. From this finding, it reached the inescapable conclusion that the remedies available to those who object to the State Bar's expenditures are the same as those available to other taxpayers, rather than in lawsuits seeking to silence the State Bar by judicial fiat.

Petitioners do not ask this Court directly to review the California Supreme Court's holding as a matter of state law that the State Bar is a governmental entity, as indeed they cannot. See *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 483, 86 L.Ed. 1611, 62 S.Ct. 1168 (1942); *Michigan v. Long*, 463 U.S. 1032, 1041, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). Petitioners attempt to do so indirectly, however, by ignoring the California Supreme Court's specific factual and legal findings regarding the State Bar, and addressing their petition to the abstract issue of the limits on state bars as a generic institution. Seeking to have federal law impose a uniform structure on the diverse needs of the states, they urge this Court to decide that the abstraction petitioners label "a state bar" is akin to a labor union, and subject to the first amendment constraints developed in the union cases, constraints that have never been applied to governmental entities. Thus, in effect petitioners ask this Court to overturn the California Supreme Court's interpretation of California law.

By ignoring the specific findings made by the California Supreme Court, petitioners attempt to manufacture a conflict between the decision of the California Supreme Court and decisions of courts that have considered the limits on compulsory fees imposed by the integrated bars of other states. However, none of the cases cited by petitioners addressed those bars' role in state government as did the California Supreme Court. None of the reported cases describe integrated bars subject to substantial legislative control of their funding and review of their activities as is the State Bar of California. Because the State Bar of California is viewed as a unit of state government, no conflict exists between the California Supreme Court's application of the standard governing government speech in this case, and other courts' applica-

tion of the standard governing private associations in cases involving integrated bars of states that have opted for an entirely different system.

In urging this Court to review the decision below as raising an important question of federal law, petitioners ignore the unique facts of this case and the state law issues that predominate. The California Supreme Court did not purport to decide what general rules govern the use of bar fees by integrated bars. Its holding was limited to the specific facts and state law issues presented by the California system, which do not appear to be duplicated in any other reported case. On these facts, federal law has long been settled. This Court has never permitted dissenting taxpayers to silence government speech for the obvious reason that it would critically undermine the government's ability to function.<sup>1</sup> The union cases cited by petitioners themselves recognize the distinction between compelled support of private organizational speech and compelled support of government speech, which is justified by the safeguards inherent in the political process as well as by the purposes and needs of government speech. See *Abood v. Detroit Board of Education*, 431 U.S. 209, 259 n.13, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) (Powell, J., concurring). California's system therefore

---

<sup>1</sup>Petitioners incorrectly characterize the California Supreme Court's decision as upholding spending for a virtually unlimited array of political and ideological activity. Petitioners also assert that the Court ignored the first amendment issues. In fact, the California Supreme Court expressly considered the limits the first amendment places on entities like the State Bar. The Court applied to the State Bar the judicially-developed limits on electioneering by government, and in doing so, found certain speeches by a former president of the State Bar to be inconsistent with those limits. Thus, in this case, state law provides more limits on government speech than does federal law, see *infra*, § II.

raises no important federal questions that should be decided by this Court, and as a matter of comity to the judicial and legislative branches of California, this Court should decline petitioners' invitation to federalize the integrated bar.

## II.

### STATEMENT OF THE CASE

The State Bar Act, California Business & Professions Code §§ 6000 *et seq.*, and article VI, section 9 of the California Constitution establish the State Bar of California as a public corporation.<sup>2</sup> The State Bar regulates the practice of law in California, which includes the admission and discipline of attorneys, B&P Code § 6046, the arbitration of fee disputes, B&P Code § 6200, and the maintenance of a client security fund, B&P Code § 6140.5. Its focus extends beyond the economic needs of its members; its statutory mandate includes the improvement of the science of jurisprudence and promotion of the improved administration of justice. B&P Code § 6031(a). The California legislature also has commanded the State Bar to aid in specific legal projects in the public interest including the Law Revision Commission and the Commission on Judicial Performance. Government Code §§ 8287, 68725.

The State Bar is governed by a twenty-three member Board of Governors, consisting of fifteen lawyers elected by the lawyers of the State, the State Bar president, and six public members, four of whom are appointed by the

<sup>2</sup>All citations are to the California Code, unless otherwise indicated. Copies of the relevant statutes omitted from the petition are included in the Appendix, as are the briefs submitted by the State Bar in each of the courts below.

governor, one by the Senate Rules Committee, and one by the Speaker of the Assembly. B&P Code § 6013.5. The State Bar funds its activity primarily through fees from lawyers admitted to practice in the State, but is required to obtain explicit legislative approval before assessing any fees. Every year, the State Bar is required to submit to the Legislature a report of all projected activities and anticipated funding needs, with details on all expenditures; the documents must be in a form comparable to those prepared by all state agencies. B&P Code § 6140.1. Based on its review of that information, the legislature passes a bill authorizing assessments at the level it deems appropriate. *Id.*

The legislature exercises control over the State Bar's powers in other ways in addition to its funding. For example, in 1984, the legislature passed a statute prohibiting the State Bar from conducting any evaluations of the credentials of a specific justice absent prior review and authorization by the legislature. B&P Code § 6031(b). The legislature also requires the State Bar to conduct the majority of its business in public meetings. B&P Code § 6026.5. In 1988, the legislature mandated additional reporting requirements for the State Bar, including progress reports on all its programs, B&P Code § 6140.35, and periodic reporting on the state of attorney discipline, B&P Code § 6140.2.

State courts have applied the California Tort Claims Act to the State Bar, *Engel v. McCloskey*, 92 Cal.App.3d 870, 155 Cal.Rptr. 284 (1979), and held that its officers may claim the public official confidential communications privilege, *Chronicle Publishing Co. v. Superior Court*, 54 Cal.2d 548, 7 Cal.Rptr. 109 (1960). Nor is any of this analysis a new aspect of California jurisprudence. In rejecting a challenge to the constitutionality of the State



Bar Act sixty years ago, the California Supreme Court upheld the legislature's exercise of the police power to create the State Bar as a public, rather than a private corporation. *State Bar of California v. Superior Court*, 207 Cal. 323, 278 P. 432 (1929).

The California Supreme Court in this case reaffirmed that the state constitution, statutes and judicial decisions "envision the bar as a governmental agency." *Keller v. State Bar of California*, 47 Cal.3d 1152, 1162, 255 Cal.Rptr. 542 (1989) (submitted as Appendix A to the petition). As a governmental agency, the State Bar is entitled to use its revenues for any purpose properly within its statutory authority, subject to the limitations on government speech applicable to all state agencies in California to protect first amendment rights.<sup>3</sup> The California Supreme Court rejected the application of *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) to the State Bar, correctly noting that the restrictions placed on labor unions' use of compulsory dues have never been applied to governmental agencies. 47 Cal.3d at 1163.

In reviewing the cases from other jurisdictions that had applied the labor union analogy to their integrated bars, the California Supreme Court noted important distinctions. "None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar.

<sup>3</sup>In *Stanson v. Mott*, 17 Cal.3d 206, 130 Cal.Rptr. 697 (1976), the California Supreme Court limited agency participation in election campaigns, barring agencies from expending public funds to promote a partisan position. In this case, the California Supreme Court held that the State Bar's actions in connection with the 1982 judicial retention elections violated the *Stanson* rule, 47 Cal.3d at 1170-72.

None involves an extensive degree of legislative involvement and regulation." 47 Cal.3d at 1167.

### III.

#### REASONS FOR DENYING THE WRIT

##### A. There Is No Conflict With Other Decisions

Petitioners urge this Court to review this case under Supreme Court Rule 17(b), as a decision of a federal question in a way in conflict with another state court of last resort or of a Federal Court of Appeals. The conflict cited by petitioners is created wholly by petitioners' distortion of the substance of the California Supreme Court's holding; properly viewed, no conflict exists.

The California Supreme Court's decision rests on the unique structure and function of the State Bar of California; its characterization of the State Bar as a governmental agency derives solely from California law. In contrast, no such analysis was performed in any of the cases cited by petitioners. See *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984); *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988); *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982); *Petition of Chapman*, 509 A.2d 753 (N.H. 1986).

The few facts concerning the status of the bars of these other states that can be gleaned from the reported decisions point toward a very different structure than that of the State Bar of California. For example, in none of the cases cited by petitioners do the funding and activities of the integrated bars appear to be subject to control by an elected legislature. See *Gibson*, 798 F.2d 1564; *Romany*, 742 F.2d 32; *Hollar*, 857 F.2d 163; *Arrow*, 544 F. Supp. 458; *Chapman*, 509 A.2d 753. Indeed, the integrated

bars of Florida, the Virgin Islands, New Mexico, Wisconsin and New Hampshire could not be subject to the type of legislative control typically exerted over state administrative agencies, because they were created by court rule and are subject only to the supervision of the judicial, and not the legislative branch. *See Gibson*, 798 F.2d at 1565; *Hollar*, 857 F.2d at 165; *Arrow*, 544 F. Supp. at 459; *Chapman*, 509 A.2d at 760 (Souter, J., concurring); *Levine v. Heffernan*, 864 F.2d 457, 458 (7th Cir. 1988). In none of these cases does the record show a governing board containing nonlawyer members appointed by elected officials. Finally, nothing in the record of any of these cases demonstrates that these other integrated bars have been treated by the state as governmental agencies.

Comparison of the Wisconsin Bar described in *Levine, supra*, 864 F.2d 457, in which the court upheld the constitutionality of the integrated bar of Wisconsin, demonstrates the difference in the policy choices among states with respect to regulation of the legal profession and justice system. Unlike the California State Bar, the Wisconsin Bar does not have sole responsibility for administering attorney discipline and continuing legal education. Indeed, the challenge to the constitutionality of the Wisconsin Bar was based on the reduction of its responsibilities in regulatory and educational areas and its purported transformation to an organization characterized as more "private" in nature.

The different relationship between the State Bar of California and the California Legislature places the State Bar squarely within the state political system subject to democratic controls not found in the descriptions of the state bars in the cases cited above. This is a key distinction for purposes of first amendment analysis. Unless a legislative majority approves of the purposes and

amounts of its spending, the State Bar is not authorized to assess fees. A legislative majority can contract and expand the State Bar's powers and provide redress not only for members of the State Bar but also for members of the general public who disagree with activities undertaken by the Bar. Indeed, in 1984, objectors to the State Bar's practice of evaluating sitting justices successfully obtained passage of B&P § 6031(b), which prohibits the State Bar from evaluating specific justices without prior legislative approval.

These are the safeguards of the democratic process that justify treating government speech differently than that of private associations such as labor unions.<sup>4</sup> As Justice Powell recognized in *Abood*:

Compelled support of a private association is fundamentally different from compelled support of government. Clearly a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people.

431 U.S. at 259 n.13.

Unlike any other court in the reported decisions discussed by petitioners, the California Supreme Court specifically found the State Bar of California, like other state

<sup>4</sup>The public purpose served by the government and the fact that its ability to function would be severely undermined by granting line item veto power to dissenting minorities also justify applying a different standard to governmental expenditures. *See Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036, 25 L.Ed.2d 647, 90 S.Ct. 1353 (1970) (rejecting first amendment challenge to military spending by opponents of Vietnam War).



agencies, is subject to substantial control by the state legislature, the representatives of the people. Thus it is clear that this finding requires the imposition of a standard different from that applied in cases not involving governmental entities. This Court has never applied the labor union analogy to government, but has in fact applied quite a different analysis. *See infra*, § B.

Petitioners concede that the issues of the propriety of the State Bar's participation in the 1982 judicial retention elections and the personal liability of State Bar officials were adjudicated on state law grounds under *Stanson v. Mott*, *supra*, 17 Cal.3d 206, and thus are not raised in the petition. (Petition at 4 n.1) Because the *Stanson* rule applies only to California governmental agencies, petitioners thus concede that the State Bar's governmental status is a matter of state law. As the ruling of the court below that the State Bar constitutes a government agency rests purely on California law, the fact that courts in other states may have arrived at different conclusions concerning their integrated bars cannot be said to create conflicting decisions on a federal question.<sup>5</sup>

Petitioners attempt to manufacture a conflict on this issue by asking this Court to view the integrated bar as a generic institution that must always be treated akin to a labor union regardless of the differences in structure, purpose, and method of operation among the various state bars. But this approach is simply an indirect way of asking this Court to overrule the California Supreme

<sup>5</sup>This issue was not even discussed in the reported cases, so it is unclear how any of these courts would have ruled on the issue of their state bar's governmental status. This disparity between the issues presented in these cases and in this case further demonstrates the lack of conflict on a federal question that would justify review by this Court.

Court's holding that the State Bar is a unit of government and not a private association. Such an approach does violence to this Court's expressed obligations to respect the independence of state courts and allow them to develop state jurisprudence unimpeded by federal interference. *See Michigan v. Long*, 463 U.S. at 1040-41. In effect, it would federalize the integrated bar.<sup>6</sup>

The only federal question presented by this case is what limits the first amendment rights of dissenters place on the activities of a governmental agency. This is not an issue that was decided, or even addressed, by any of the cases cited by petitioners as in conflict with the decision of the California Supreme Court.

## **B. The Only Federal Question Implicated By The California System Has Long Been Settled**

### **1. The First Amendment Does Not Restrain Government Speech Rationally Related To A Legitimate Governmental End**

Petitioners alternatively urge review of this case under Supreme Court Rule 17(c) as raising important issues of federal law that should be resolved by this Court. However, this Court already has addressed and consistently has rejected first amendment challenges by opponents of

<sup>6</sup>Labor law is highly federalized by the National Labor Relations Act and its amendments in the Labor Management Relations Act, 29 U.S.C. §§ 141 et seq., as well as by the Railway Labor Act, 45 U.S.C. 151 et seq. State labor regulation is limited by broad principles of federal preemption, *see, e.g., Garner v. Teamsters Local 776*, 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953). Thus, the states never have been free to develop their own concepts of unionism outside the long shadow of federal law. By contrast, Congress left the field of regulation of the practice of law entirely to the states.



governmental spending, and the petition demonstrates no reason for this Court to revisit the issue.

In *American Party of Texas v. White*, 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974) this Court rejected an equal protection challenge based on speech and associational rights to the Texas legislature's use of revenues to reimburse the two major political parties for primary expenses. This Court again rejected a taxpayer challenge to government funding of speech in *Regan v. Taxation with Representation of Washington*, 461 U.S. 609, 76 L.Ed.2d 129, 103 S.Ct. 1997 (1983), holding that government may spend tax revenues on speech activities subject only to a showing that the expenditure is rationally related to a legitimate governmental objective. As the Court noted in *FCC v. League of Women Voters of California*, 468 U.S. 364, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984), virtually every legislative appropriation will to some extent involve a use of public money as to which some taxpayers may object. "Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." 468 U.S. at 385 n.16.

*Miller v. California Commission on the Status of Women*, 151 Cal.App.3d 693, 198 Cal.Rptr. 877, appeal dismissed for want of jurisdiction, 469 U.S. 1133, 83 L.Ed.2d 15, 105 S.Ct. 64 (1984), a case involving substantially similar factual and legal issues to those presented here, illustrates how these well-settled principles apply to this case. In *Miller*, plaintiffs challenged a governmental agency's speech addressing the status of women, postulating "their right not to enhance the Commission's speech by tax support." 151 Cal.App.3d at 700. The California Court of Appeal rejected this challenge, noting that if the government cannot appoint a commission to speak on a controversial topic without implicating dissenting taxpayers'

first amendment rights, it would lose its ability to govern. 151 Cal.App.3d at 701. The Court noted the availability of means within the democratic process for dissenters to seek redress, including speaking out at the Commission's public meetings and using the electoral process to defeat legislators who appointed the commissioners and supported their positions. *Id.* at 702. This Court dismissed the appeal for want of jurisdiction. The present petition retraces that very same ground, without raising any distinguishing factual or legal issues.

## 2. All Government Speech Is Subject To The Same Standard Regardless Of The Source Of The Revenue Spent

The fact that the license fees at issue in this case are not drawn from the entire populace does not affect the first amendment analysis, which derives not from the source of the revenue that is spent, but from the fact that the government spending itself is subject to the controls of the democratic process. *See Abood, supra*, 431 U.S. at 259 n.13 (Powell, J., concurring).<sup>7</sup> In *United States v. Lee*,

<sup>7</sup>Indeed, in the labor union cases, this Court focussed on the purpose of the compelled contributions, and the nature of the entity, rather than relying on the source of the funding as the key to its analysis. For example, in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984), the Court looked to the purpose of compulsory union support under the Railway Labor Act and found it to be elimination of the "free rider" effect. 466 U.S. at 447. Although in *Abood* the Court refused to distinguish between expenditures by unions in the private sector and those by unions in the public sector, this was because the purpose justifying compulsory support was substantially similar in both instances. *See* 431 U.S. at 232 (union security issue the same in both private and public sector). Accordingly, expenditures from compulsory dues in both sectors must be limited to those germane to this statutory purpose. (footnote continued on next page)

455 U.S. 252, 71 L.Ed.2d 127, 102 S.Ct. 1051 (1982), this Court rejected a first amendment challenge to payment of social security tax based on the challenger's objection to governmental use of the revenues. This Court found no principled basis to distinguish between the use of general taxes and the use of taxes from a more narrowly drawn pool, such as employers subject to social security taxes, for the purpose of first amendment analysis. 455 U.S. at 259-60. See also *Erzinger v. Regents of the University of California*, 137 Cal.App.3d 389, 187 Cal.Rptr. 164 (1982), cert. denied, 462 U.S. 1133, 77 L.Ed.2d 1368, 103 S.Ct. 3114 (1983) (rejecting first amendment challenge to use of mandatory student health fees for abortion counseling). Under federal law, a governmental agency may use unrestricted revenue whether derived from taxes, dues, fees, tolls, tuition, donation or other sources for any purposes within its authority. The same is true in California, subject to the additional restrictions imposed by *Stanson v. Mott*, supra.

### C. This Court Should Not Reach Out To Take A Case So Dependent On Issues Of State Law

The decision below is of limited impact beyond California. As the California Supreme Court affirmed the constitutionality of the State Bar's expenditures based on the State Bar's status as an agency of the State of California, the state law issues are inextricably intertwined with the federal constitutional issue. Thus, not only is review of this case not justified under Supreme Court Rule 17(c),

---

The purpose of compulsory support of government is, of course, far broader, extending well beyond support of any one interest group. L. Tribe, *American Constitutional Law* § 12-4 at 807 (1988) (distinguishing government speech from compelled support of union speech).

but also prudential concerns of due deference to state court interpretation of state law counsel against it.<sup>8</sup>

There is no need for a federal rule mandating uniform treatment of all state bars. States should be free to make policy choices on how to regulate the legal profession in response to their diverse circumstances, as they are free to formulate other legal relationships. See P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* at 533 (3d ed. 1988) Treatment of state bars should be responsive to and reflective of this diversity.

---

<sup>8</sup>Because of this controlling state law issue, the issues presented by this case do not address any questions left open by this Court's prior examination of a challenge to an integrated bar. In *Lathrop v. Donahue*, 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961), while upholding the constitutionality of the integrated bar of Wisconsin, created by the Wisconsin Supreme Court as an "association... composed of persons licensed to practice law in this state," 367 U.S. at 825, this Court refused to rule on the constitutionality of its expenditures in the absence of a well-developed factual record. No finding that the Wisconsin Bar constituted a unit of state government was before the Court, and the various members of the Court appeared to assume otherwise. See, e.g., 367 U.S. at 881-82 (Douglas, J., dissenting) (lawyers should be free not to join an association of other lawyers).

Justice Harlan's discussion of government speech standards as a useful analogy for viewing the case demonstrates that he did not view the case as actually presenting this issue, and his formulation of government speech standards went unchallenged by either the plurality or the dissent. See 367 U.S. at 858 (Harlan, J., concurring) (taxpayer's objections to views governmental agency presents to the legislature at public expense do not implicate first amendment).

## IV.

## CONCLUSION

The decision of the California Supreme Court presents neither a conflict with other reported decisions on the same issue, nor an important question of federal law requiring resolution by this Court. It rests squarely on the state laws that create the State Bar of California as an arm of government and on well-established federal and state principles controlling government speech. The deference this Court repeatedly urges toward state court interpretation of state constitutional and regulatory schemes, and the need to avoid unnecessary constitutional decisions, counsel against the granting of the petition for certiorari. Accordingly, respondents respectfully request this Court to deny the petition for writ of certiorari to the California Supreme Court.

DATED: JUNE 21, 1989

Respectfully submitted,

HERBERT M. ROSENTHAL

DIANE C. YU \*

555 Franklin Street  
San Francisco, California  
(415) 561-8200

\* Counsel of Record for the  
State Bar of California

HUFSTEDLER, MILLER,

KAUS & BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

JUDITH R. STARR

355 S. Grand Avenue

45th Floor

Los Angeles, California

90071

(213) 617-7070



## **APPENDIX A**

## APPENDIX A

§ 6140.1. Proposed baseline and proposed final budgets; contents; fiscal bill; submission of documents; budget change proposals

The State Bar annually shall submit its proposed baseline budget for the following fiscal year to the appropriate fiscal committees of the Legislature and the Joint Legislative Budget Committee by November 15, and its proposed final budget by February 15, so that the budget can be reviewed and approved in conjunction with any bill that would authorize the imposition of membership dues. Each proposed budget shall include the estimated revenues, expenditures, and staffing levels for all of the programs and funds administered by the State Bar. Any bill that authorizes the imposition of membership dues shall be a fiscal bill and shall be referred to the appropriate fiscal committees; provided, however, that the bill may be approved by a majority vote.

The State Bar shall submit the budget documents in a form comparable to the documents prepared by state departments for inclusion in the Governor's Budget and the salaries and wages supplement. In addition, the bar shall provide supplementary schedules detailing operating expenses and equipment, all revenue sources, any reimbursements or interfund transfers, fund balances, and other related supporting documentation. The bar shall submit budget change proposals with its final budget, explaining the need for any differences between the current and proposed budgets.

\* \* \*

(Added by Stats.1986, c. 2, § 2, eff. February 4, 1986. Amended by Stats.1986, c. 1510, § 2; Stats.1987, c. 688, § 3; Stats.1988, c. 1149, § 2.5)

Underline indicates changes or additions by amendment

§ 6140.2. Reports to judiciary committees on procedural changes and improvements in disciplinary system; reduction of complaints in inventory; goal for timely disposition of complaints

(a) On or before April 1, 1986, and June 1, 1986, the State Bar shall submit reports to the Judiciary Committees of the California State Senate and Assembly on the procedural changes and improvements which have been made in the State Bar disciplinary system and what effect these changes have had on the number of complaints pending, the time required to process these complaints, and the progress made in reducing the backlog of complaints.

(b) On or before December 31, 1987, the State Bar shall reduce by 80 percent the complaints within its inventory as of March 31, 1985, which have been received but have not resulted in dismissal, admonishment of the attorney involved, or filing of formal charges by State Bar Office of Trial Counsel. This reduction shall be accomplished by dismissal, admonishment of the attorney involved, or recommendation by the State Bar for disposition by the Supreme Court.

(c) The State Bar shall set as a goal by December 31, 1987, the improvement of its disciplinary system so that no more than six months will elapse from the receipt of complaints to the time of dismissal, admonishment of the attorney involved, or the filing of formal charges by the State Bar Office of Trial Counsel.

(Added by Stats.1986, c. 2, § eff. February 4, 1986.)

§ 6140.5. Client security fund; establishment; payments; administration; funding

(a) The board may establish and administer a Client Security fund to relieve or mitigate pecuniary losses caused by the dishonest conduct of those active members of the State Bar. Any payments from the fund shall be discretionary and shall be subject to such regulation and conditions as the board shall prescribe. The board may delegate the administration of the fund to the disciplinary board provided for in Section 6086.5, or to any board or committee created by the board of governors.

(b) Commencing January 1, 1972, the board may increase the annual membership fees fixed by it pursuant to Section 6140 by an additional amount per active member not to exceed ten dollars (\$10) in any year, the additional amount to be applied only for the purposes of the fund.

(Added by Stats.1971, c. 1338, p. 2642, § 3.)

§ 6140.35. Progress reports; duration of section

(a) The board shall annually present written and oral progress reports on all State Bar programs to the Judiciary Committees of the Senate and Assembly, as directed by those committees.

(b) This section shall remain in effect until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1992, deletes or extends that date.

(Added by Stats.1988, c. 1159, § 29.)



§ 6200. Establishment of system and procedure; applicability of article; voluntary or mandatory nature; rules; immunity of arbitrator; powers of arbitrator

(a) The board of governors shall, by rule, establish, maintain, and administer a system and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. The rules may include provision for a filing fee in such amount as the board \* \* \* may, from time to time determine.

(b) This article shall not apply to any of the following:

(1) Disputes where the attorney is also admitted to practice in another state, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California.

(2) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct, except as provided in subdivision (a) of Section 6203.

(3) Disputes where the fee to be paid by the client or on his or her behalf has been determined pursuant to statute or court order.

(c) Arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client.

(d) The board of governors shall adopt rules to allow arbitration of attorney fee disputes under this article to proceed under arbitration systems sponsored by local bar associations in this state. Rules of procedure promulgated by \* \* \* local bar associations are subject to review by the board \* \* \* to insure that they provide for a fair, impartial, and speedy hearing and award. In adopting or re-

viewing these rules, the board \* \* \* may provide for one lay member of any arbitration panel of three arbitrators.

(e) In any arbitration conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, the arbitrator or arbitrators, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings.

(f) In the conduct of arbitrations under this article the arbitrator or arbitrators may do all of the following:

(1) Take and hear evidence pertaining to the proceeding.

(2) Administer oaths and affirmations.

(3) Compel, by subpoena, the attendance of witnesses and the production of books, papers, a documents pertaining to the proceeding.

(Added by Stats.1978, c. 179, p. 2249, § 1. Amended by Stats. 1984, c. 825, § 1.)

§ 6046. Examining committee; powers

The board may establish an examining committee having the power.

(a) To examine all applicants for admission to practice law.

(b) To administer the requirements for admission to practice law.

(c) To certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter.

The examining committee shall be comprised of 19 members, 10 of whom shall be members of the State Bar

or judges of courts of record in this state and nine of whom shall be public members who have never been members of the State Bar or admitted to practice before any court in the United States. At least one of the attorney members shall have been admitted to practice law in this state within three years from the date of their appointment to the examining committee.

(Amended by Stats.1986, c. 1392, § 1; Stats.1988, c. 1159, § 2.3.)

§ 8287. Assistance from board of governors of bar

The Board of Governors of the State Bar shall assist the commission in any manner the commission may request within the scope of its powers or duties.

(Formerly § 10307, added by Stats.1953, c. 1445, p. 3037, § 2. Renumbered § 8287 and amended by Stats.1984, c. 1335, § 2.)

§ 68725. Assistance and information

State and local public bodies and departments, officers and employees thereof, and officials and attaches of the courts of this State shall co-operate with and give reasonable assistance and information to the commission and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the commission.

(Added by Stats.1961, c. 564, p. 1683, § 1.)

## **APPENDIX B**



**APPENDIX B**

**HUFSTEDLER, MILLER, CARLSON & BEARDSLEY**

**ROBERT S. THOMPSON**

**DENNIS M. PERLUSS**

**LAURIE D. ZELON**

**MARY E. HEALY**

**700 South Flower Street**

**16th Floor**

**Los Angeles, California 90017-4286**

**(213) 629-4200**

**HERBERT M. ROSENTHAL**

**TRUITT A. RICHEY, JR.**

**MAGDALENE Y. O'ROURKE**

**555 Franklin Street**

**San Francisco, CA 94102-4498**

**(415) 561-8200**

*Attorneys for Defendants*

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**EDDIE KELLER, et al.,**  
*Petitioners and Plaintiffs,*

**VS.**

**STATE BAR OF CALIFORNIA, et al.,**  
*Respondents and Defendants.*

**CIV. NO. 307168**

**NOTICE OF MOTION FOR SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND AUTHORITIES;  
AND DECLARATIONS IN SUPPORT THEREOF**

**Date: December 5, 1983**

**Time: 9:00 a.m.**

**Place: Department 21**

TO ALL PARTIES AND THEIR ATTORNEYS OF  
RECORD:

NOTICE IS HEREBY GIVEN that on December 5, 1983, at 9:00 a.m., or as soon thereafter as this matter may be heard, in Department 21 of the above-captioned Court, at 720 Ninth Street, Sacramento, California, defendants State Bar of California, Anthony M. Murray, Patricia Greene, Girt K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Louks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. David, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward and Joon Hee Rho will move this Court for an order granting summary judgment in their favor. Defendants will move, in the alternative, for summary adjudication of issues, or for judgment on the pleadings.

This motion will be based on this Notice of Motion, the Memorandum of Points and Authorities and Declarations in Support Thereof, and all other papers and pleadings on file in this action.

DATED: November 15, 1983.

Respectfully submitted,

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE

By LAURIE D. ZELON  
*Attorneys for Defendants*

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Defendants, the State Bar of California and members of the Board of Governors of this public agency, seek an order of this honorable court granting judgment on behalf of the agency and on behalf of each individual member. In the alternative, defendants' motion seeks a judgment on the pleadings or an order that all dispositive issues now raised by plaintiffs' complaint are determined in defendants' favor. If summary judgment is granted the matter will be concluded. If the alternative motions are granted plaintiffs may seek leave to amend.\*

Plaintiffs' complaint seeks to enjoin all activity of the State Bar encompassed in the following categories:

- (a) lobbying the California Legislature;
- (b) submitting briefs *amicus curiae*;
- (c) financing meetings of the Conference of Delegates;
- (d) publicizing the speeches by the President of the State Bar; and
- (e) financing the public information project on judicial retention.

Complaint, ¶ 6.

It also seeks to hold the individual defendants liable for past expenditures of the State Bar utilized to finance its activities in these categories. Plaintiffs seek reimbursement of all fees expended for "political and ideological purposes" (Prayer, ¶ 3), without further specifying those activities.

\*We do not concede that leave to amend should be granted.

We demonstrate in more detail in the following portions of this memorandum that:

1. the State Bar is an agency of the California state government created by Article VI, § 9 of the California Constitution and implementing legislation;

2. because the State Bar is an agency of government it has all powers expressly or implicitly granted it by the Constitution and statute, limited only by restrictions imposed by the Constitution. *Stanson v. Mott*, 17 Cal.3d 206 (1976);

3. each category of State Bar activity and each specific activity of the State Bar mentioned in the complaint is expressly or implicitly authorized by the California Constitution and the State Bar Act. This authorization is confirmed annually by the Legislature in enacting legislation providing for financing the State Bar after receiving the agency's proposed budget for the ensuing year;

4. no constitutional restriction precludes the State Bar from engaging in the categories of activity described in the complaint or the specific functions mentioned in it. To the contrary, two decisions of the United States Supreme court issued since the complaint was filed reject the constitutional attack mounted by plaintiffs. *Regan v. Taxation with Representation of Washington*, \_\_\_ U.S. \_\_\_, 76 L.Ed. 2d 129 (1983); *Common Cause v. Bolger*, \_\_\_ U.S. \_\_\_, 77 L.Ed.2d 280 (1983);

5. the authorities upon which plaintiffs relied in their unsuccessful motion for preliminary injunction are inapplicable to agencies of government. They are pertinent only to the affairs of private organizations; and



6. a controlling decision of the California Supreme Court mandates rejection of plaintiffs' claim that the individual members of the Board of Governors of the State Bar are liable. *Stanson v. Mott, supra*.

## II. PROCEEDINGS TO DATE

Plaintiffs' complaint seeking declaratory and injunctive relief was filed on October 25, 1982. Subsequent amendments, adding plaintiffs, have been filed without changes in the substantive allegations. As set forth above, plaintiffs challenged the expenditures of the State Bar for "political and ideological causes," and sought to enjoin such expenditures and to require individual members of the Board of Governors to refund fees used for those purposes. Except for the five items listed in paragraph 6 of the Complaint, and set out above, plaintiffs failed to state with specificity the activities to which they object. Rather, they seek relief banning all such use of fees, whether or not such uses are related to matters within the scope of the Bar's statutory and constitutional authorization.

On October 26, 1982, pursuant to plaintiffs' motion, a Temporary Restraining Order and Order To Show Cause was issued. Although plaintiffs sought broader relief, the TRO only prohibited the expenditure of named plaintiffs' fees to promote "particular criteria regarding the evaluation of judges in judicial retention elections." Order, October 25, 1982, at 2.

Subsequently, plaintiffs' motion for preliminary injunction was brought on for hearing on January 28, 1983. On March 4, 1983, the Court denied that motion and dis-

solved the temporary restraining order then in effect.\* The Court declined to grant injunctive relief, finding it unlikely that plaintiffs would prevail. Order at 2. The Court also found that plaintiffs had failed to demonstrate irreparable injury, *Id.* at 3.

Since that hearing, plaintiffs have propounded discovery requests to defendants, to which responses have been served.

## III. THE INJUNCTIVE RELIEF REQUESTED BY PLAINTIFF IS NOT AVAILABLE AS A MATTER OF LAW

As will be demonstrated below, plaintiffs' requested relief is directly contrary to that approved even by the authority on which they rely. Further, and more importantly, plaintiffs ignore the very relevant distinctions between the California State Bar, a public agency of the State of California with both statutory and constitutional authority, and a private organization formed to serve the economic interests of its membership. This distinction is one recognized as a matter of federal and California law. As a result, plaintiffs request this Court to grant relief contrary to relevant federal and state authority. Therefore, summary judgment should be granted.

### A. The State Bar is an Agency of State Government

As set forth in Defendants' Memorandum of Points and Authorities in opposition to the Motion for Preliminary Injunction ("Defendants' Memorandum"),\*\* the defen-

---

\*On December 2, 1982, the Court entered an order continuing the hearing on the preliminary injunction and ordering that all fees paid by named plaintiffs be held in a separate account pending that hearing.

\*\*A copy of that Memorandum is attached hereto for the convenience of the Court as Exhibit A.

dant State Bar is a public agency of the State of California, and its conduct is governed by the rules applicable to California state agencies. Defendants' Memorandum at pp. 14-15. Thus, its expenditures are proper to the extent that "they are authorized, explicitly or implicitly, by legislative enactment." *Stanton v. Mott*, 17 Cal.3d 206, 213 (1976). As such, the State Bar is a substantially different entity than the union to which plaintiffs seek to compare it. Its function and purposes are public, not private. It is a part of state government and the authorization for its expenditures and functions is both explicit and implicit.

**B. The State Bar May Engage in All Activities Expressly or Implicitly Authorized by The State Constitution or Statute**

**1. The State Bar Has Broad Explicit Authorization**

The State Bar has broad legislative authorization under Bus. & Prof. Code §§ 6001, 6028, and 6031. That latter section provides:

"The Board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the Bar with the public."

In addition, the State Bar is established by the Constitution of the State of California. Article VI, § 9. This constitutional provision was approved by the voters in 1960. See Defendants' Memorandum at pp. 6-8.

Finally, a detailed report of the expenditures and activities of the State Bar is submitted to the Legislature on an annual basis in seeking legislative approval of fees. The Legislature approves those activities in setting the permissible fees to be charged by the State Bar each year

on the basis of this submission. See, e.g., material submitted to Legislature attached as Exhibits 1-2 to Defendants' Memorandum.

**(2) The State Bar Has Implicit Authorization For The Challenged Activities**

**a) Lobbying**

Lobbying of the Legislature concerning issues within the scope of Bus. & Prof. Code § 6031 has the explicit and implicit approval of the Legislature. It is explicitly approved on an annual basis by means of the fees bill, as set forth above. It is implicitly approved by prevailing California case law, exemplified by the leading case of *Stanson v. Mott*, supra. In that case, the Court specifically approved lobbying efforts even though such efforts might be for causes with which members of the public might disagree. 17 Cal. 3d at 218. Despite this authority, however, plaintiffs would have this Court bar the State Bar from all lobbying activities outside of the areas of admissions, discipline, and fees despite the specific authorization which the Bar has been given. Complaint, ¶ 6.

That California law clearly permits public agencies to lobby is beyond challenge. See *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318 (1927); *Lehane v. City & County of San Francisco*, 30 Cal. App. 3d 1051 (1972). Indeed, the *Lehane* case makes clear that lobbying is permitted even though the individual taxpayer objects to the position which the state agency is taking.

"If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of the government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in



others, his recourse is to vote against them." 30 Cal. App. 3d at 1056.

See also *DeMille v. American Federation of Radio Artists*, 31 Cal. 2d 139 (1947) (majority rule permits imposition of a tax despite disagreement by a taxpayer with the purposes for which the tax is levied).

b) *Dissemination of Information To The Public*

Public agencies may also expand funds to inform potential voters about issues with which they are familiar, so long as a fair presentation of facts is made. See *Stanson, supra*, 17 Cal. 3d at 221 n.6; 58 Ops. Cal. Atty. Gen. 29 (1975); 51 Ops. Cal. Atty. Gen. 190 (1968); 42 Ops. Cal. Atty. Gen. 25 (1963); 35 Ops. Cal. Atty. Gen. 112 (1960). Plaintiffs seek specifically to bar such activity by objecting to the education project on the judiciary. Complaint ¶ 6. However, plaintiffs do not allege anywhere in their complaint that the materials assembled for that project are anything other than a fair presentation of facts and of such style and tenor that they constitute a proper attempt to inform the voters about issues concerning which the Bar has special knowledge and unique responsibilities. Rather, plaintiffs merely assert that the project is political or ideological and thus improper. That bare assertion is incorrect.

The relevant cases cited above permit, and may even require, the State Bar to educate the public in this area. The materials in the project present information to the public, without exhorting the public to vote for a specific position. The materials used were attached to the complaint as Exhibit E; the plaintiffs had access to those materials and an opportunity to review them, but could find no grounds on which to challenge them under California law. If this Court should analyze these materials, despite the absence of any specific allegations, it will find

the materials to be fair and balanced, not improperly motivated or styled.

c) *Other Activities*

The State Bar's authority within other major challenged areas is established by California law. Plaintiffs object to substantially all of the State Bar's other activities, some specifically, but most generally. The Bar has already addressed such of those issues as plaintiffs identified in their complaint in Defendants' Memorandum at 17-28, and respectfully refers the Court to that discussion.

Plaintiffs seek to, but may not, stop the State Bar from engaging in activities because plaintiffs apparently disagree with the positions taken by the Board of Governors, chosen in a democratic manner to set such policies. Such disagreement does not permit the silencing of the entire bar. See *Lehane, supra*, 30 Cal.App.3d at 1056. This doctrine has been clearly recognized outside of California as well.

"It is true that [a member of the State Bar] is required to contribute to the cost of the operation of the State Bar, and he may not agree with all of the policies as determined by its Board of Governors. The Board of Governors is selected in a democratic manner. It is frequently true in a democratic society that the wishes of the majority are overruled, even though they must contribute to the cost of the programs carried forward by the majority." *Sams v. Olah*, 225 Ga. 497, 505 (Ga. Sup. Ct. 1969).\*

In *Sams*, the court concluded that the test for illegal expenditures is not a broad test of whether the funds are

---

\* A copy of this opinion is attached hereto for the convenience of the Court as Exhibit B.



being spent contrary to the individual's wishes, but rather whether the funds were spent for the authorized purposes of the State Bar. 225 Ga. at 507. By this reasoning, the most plaintiffs could seek to bar would be those activities demonstrably outside of the activities authorized by the Constitution and the Legislature.

However, plaintiffs' approach is categorical; the defense may similarly be categorical. So long as the State Bar engages in activities which are appropriate under California law, as they do, plaintiffs are not entitled to the extremely broad relief they request. Plaintiffs seek no limited, alternative relief, nor do they allege that authority might exist for any specific, focused relief such as the rebate procedure approved in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976). However, such a procedure would not be authorized by authority relevant to this case, even had plaintiffs requested it. As a result, their complaint must be dismissed.

#### C. The Challenged Activities Are Constitutional

Defendants' position is further authorized by recent decisions of the United States Supreme Court. The Court has clearly stated that the government may, in certain instances, use tax dollars to subsidize issue-oriented speech. There need be no compelling governmental interest to support this decision, but only a rational relationship to legitimate governmental purposes. *Regan v. Taxation With Representation of Washington*, \_\_\_ U.S. \_\_\_, 76 L.Ed.2d 129 (1983). (A copy of this opinion is attached hereto for the convenience of the Court as Exhibit C.) The same test is mandated by the applicable California authority cited above, and governs this case.

In addition the Court last term affirmed without opinion the decision of a three-judge District Court in *Common Cause v. Bolger*, \_\_\_ U.S. \_\_\_, 77 L.Ed.2d 280

(1983). In that case, the Court held that incumbent legislators may use the franking privilege without violating the constitutional rights of voters and nonincumbents. The court declined to apply a strict scrutiny analysis, because any restriction on First Amendment rights was indirect and, because it applied to all non-incumbents, was not content-related. The same is true here; any restriction is indirect and applies to all who disagree with the majority position on a broad spectrum of issues, not to any particular position.\*

The State Bar speaks as a government agency and must be governed by this law in all respects. Although plaintiffs allege that the State Bar purports to represent the views of its individual members, that claim is demonstrably without basis in fact and is merely an unsupportable conclusion. The State Bar speaks as a constitutional and statutory body. See Affidavits of Peter Jensen and Terrence Flanigan, lobbyists for the State Bar, attached hereto as Exhibits E and F; State Bar's Answers to Plaintiffs' Interrogatory No. 3, attached hereto as Exhibit G.

#### D. The Authorities Previously Relied On by Plaintiffs Are Inapplicable

Plaintiffs have relied primarily on *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), and *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982) for their claim for relief in this case. However, as set forth by defendants in Defendants' Memorandum at 28-33, that authority does not govern here.

*Abood* governs where mandatory fees are imposed by a private organization, in that case, a union. The State Bar,

---

\* A copy of this opinion is attached hereto for the convenience of the Court as Exhibit D.

in contrast, is a legislatively and constitutionally authorized agency of the government of the State of California. The difference is both substantial and vital. Integrated state bars, as governmental agencies, must be treated differently from private organizations as a matter of federal constitutional law. *State Bar of Texas v. United States of America*, No. CA 3-81-9536-C, United States District Court for the Northern District of Texas, Dallas Division, March 25, 1983 (Slip opinion at 4).<sup>\*</sup> See also *Sams v. Olah*, 225 Ga. 497, 506 (Ga. Sup. Ct. 1969) (integrated state bar is not a labor organization).

There are other differences as well. The private organization in *Abood* set its own dues; in contrast, the fees of the State Bar are set by the California State Legislature. The difference between private assessments and legislatively approved taxes is substantial.

In addition, the purpose of the State Bar, as defined by its establishing authority, is broad; the Bar is instructed to undertake substantial duties in the public interest. In contrast, a labor union serves limited economic interests of its membership; in some situations, those members may be able, through the bargaining process, to extract from non-members a *pro rata* share of the expenses connected with the economic benefits those non-members receive. See *Abood, supra*, 431 U.S. at 222. In other instances, the union may, through bargaining, be able to require membership. In such cases, mandatory dues may only be spent for functions related to the benefits provided. See *Ellis v. Brotherhood*, 685 F.2d 1065 (9th Cir. 1982), cert. granted \_\_\_\_ U.S. \_\_\_\_ (1983).<sup>\*\*</sup>

<sup>\*</sup> A copy of this opinion is attached hereto for the convenience of the Court as Exhibit H.

<sup>\*\*</sup>The Court in *Ellis* declined to take a narrow view of those activities which provided benefits to members and for which they

Even if the union analogy were apposite, however, *Abood* specifically rejected the relief requested herein. Plaintiffs therefore rely on *Arrow v. Dow, supra*, to provide the nexus to the relief they request. However, *Arrow* is not only inconsistent with the decisions of the California Supreme Court cited above, but also, by permitting broad relief prohibiting all "political" activities, violates the rule set out in *Abood*.

The broad reading adopted by the *Arrow* court has been rejected in the recent decision of the Florida Supreme Court. In *The Florida Bar Re: Amendment to Integration Rule*, No. 61,424, decided September 22, 1983, the Supreme Court held that political activity by its bar, established by rule of Court, was within the defined purpose of the bar "to improve the administration of justice, and to advance the science of jurisprudence." Opinion at 2. The Court, in determining whether the challenged activities were germane, looked broadly at purpose, as the *Arrow* court failed to do. (A copy of the Opinion is attached hereto for the convenience of the Court as Exhibit I.)

*Arrow* is also inapplicable to the California State Bar factually, in that it involves a bar association established by rule of court, not by constitutional and legislative authorization. The California State Bar is, however, a unique institution among unified state bars, as it is a state agency, with both constitutional and legislative authorization, and subject to legislative oversight. It is neither a private organization, nor an organization created under the limited authority of rule of court. The New Mexico Bar does not have the broad mandate imposed on the California Bar. As the scope of authorized activity is central to the *Abood* analysis, this difference is substan-

could be forced to contribute. This should be contrasted with the extremely limited view of scope sought to be imposed by plaintiffs in this case.



tial and indicates that *Arrow* cannot control here. Thus, plaintiffs have no authority for the relief they request.

#### IV. THE INDIVIDUAL MEMBERS OF THE BOARD OF GOVERNORS CANNOT BE HELD LIABLE

Plaintiffs seek relief involving restitution of the sums spent for allegedly inappropriate activities from the individual members of the Board of Governors. However, plaintiffs' complaint contains no allegations concerning the individual members of the Board of Governors other than the fact that they are members of the Board of Governors. There are no allegations that these members acted in bad faith, or in any way outside of the scope of their duties as members of the Board of Governors. Under these circumstances, there is no authority for any such restitutionary order.

In fact, California state law is to the contrary. *Stanson v. Mott*, 17 Cal.3d 206 (1976), specifically overruled an earlier decision of the California Supreme Court establishing strict liability for public officials authorizing the improper expenditure of public funds. 17 Cal.3d at 223, overruling *Mines v. Delvalle*, 201 Cal. 273 (1927). The *Stanson* court adopted instead the requirement that public officials use

" 'due care,' i.e., reasonable diligence, in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care." 17 Cal.3d at 226-27.

Various factors were set forth by the Court in determining whether a public official acted with the requisite due care.

They were:

1. whether the expenditure's impropriety was obvious;
2. whether the official knew of the possible invalidity of the expenditure;
3. whether the official relied on legal advice or on the presumed validity of an existing legislative enactment or judicial decision. 27 Cal.3d at 227.

Plaintiffs have made no allegations relating to any of these standards. Although the plaintiff in *Stanson v. Mott* was permitted to amend his complaint, this permission was granted because, under the existing rule prior to *Stanson*, no such allegations were required. However, such is not the case here. The *Stanson* standard has been the law since 1976, and plaintiffs are bound by it.

Further, even accepting all of plaintiffs' allegations in the complaint as true, there are and can be no allegations which indicate that any expenditures were obviously improper, that any member of the State Bar Board of Governors knew of any potential invalidity, or that the State Bar Board of Governors did not rely on the presumption of validity given by the legislative approval of its activities. Such allegations could not be made, in light of the Legislature's actions, and the long-standing rule of governing public agencies in California.

There is simply, no basis for plaintiffs' attempt to obtain restitution from the individual members of the Board of Governors. Thus, in any event, the summary judgment in favor of these defendants should be granted, dismissing them from the lawsuit with prejudice.



V. CONCLUSION

For the reasons set forth above, defendants respectfully request that this Court grant their motion for summary judgment.

DATED: November 15, 1983.

Respectfully submitted,  
HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE

By LAURIE D. ZELON

*Attorneys for Defendants*

## **APPENDIX C**

**APPENDIX C**  
**COURT OF APPEAL, STATE OF CALIFORNIA**  
**THIRD APPELLATE DISTRICT**

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE;  
GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GORDNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON;  
CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY  
L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R.  
YANGER; WARD A. CAMPBELL; DONALD C. MEANEY; ASSEMBLYMAN  
PATRICK J. NOLLAN; AND A. WELLS PETERSEN,  
*Appellants,*

vs.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY;  
PATRICIA GREENE; GERT K. HIRSCHBERG; LELAND R. SELNA, JR.;  
GEOFFREY VAN LOUCKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE  
W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q.  
DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT  
A. HINE; PHYLLIS M. HIX; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A.  
SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; AND JOON HEE RHO,  
*Respondents.*

3rd Civil No. 24124  
(County No. 307168)

APPEAL FROM THE SUPERIOR COURT  
OF SACRAMENTO COUNTY  
HONORABLE HORACE E. CECCHETTINI, JUDGE

**RESPONDENTS' BRIEF**

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, California 94102  
(415) 561-8200

HUFSTEDLER, MILLER, CARLSON &  
BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street,  
16th Floor  
Los Angeles, California 90017  
(213) 629-4200

*Attorneys for Respondents*



## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	C-iii
I. INTRODUCTION .....	C-1
II. ISSUES PRESENTED .....	C-3
III. STATEMENT OF FACTS .....	C-4
A. Procedural History .....	C-4
B. The History Of The State Bar And Its Activi- ties .....	C-5
C. The Complaint .....	C-7
IV. ARGUMENT .....	C-8
A. California Law Permits A Public Entity, Such As The State Bar, To Engage In The Type Of Activities In Which The State Bar Engages .....	C-9
1. The State Bar Is A Public Entity .....	C-9
2. Public Entity Authority Is Tested By The Implicit And Explicit Powers Granted To The Agency By The Constitution And Legislative Action .....	C-11
a. <i>Stanson v. Mott</i> .....	C-11
b. <i>Miller v. California Commission</i> .....	C-12
3. The Legislative Authority Explicitly And Implicitly Authorizes The Full Scope Of Current State Bar Activity .....	C-13
a. The Specific Authorization Is Broad	C-13
b. The Activities Of The State Bar Have Been Specifically Approved By The Legislature And The Voters .....	C-14
4. Appellants Have Failed To Show That The Challenged Activities Are Outside The Scope Of The State Bar's Authorization	C-16
a. Lobbying .....	C-17
b. <i>Amicus Curiae</i> Briefs .....	C-20

## TABLE OF CONTENTS

	<u>Page</u>
c. The Conference Of Delegates .....	C-21
d. President's Speeches.....	C-21
e. Public Information On Judicial Independence .....	C-22
B. The Challenged Activities Are Constitutional	C-22
C. The Cases On Which Appellants Rely Do Not Affect The Controlling Case Law .....	C-24
1. <i>Abood v. Detroit Board of Education</i> .....	C-24
2. <i>Ellis v. Brotherhood</i> .....	C-26
3. <i>Arrow v. Dow</i> .....	C-27
4. Even If <i>Abood</i> Were Held To Apply, The Requested Relief Would Not Be Available	C-29
a. The Decision in <i>Abood</i> Does Not Permit An Injunction Against The State Bar .....	C-30
b. <i>Abood</i> Limits Relief To Activities Which Are Not Germane To The Purpose For Which The Organization Is Formed .....	C-30
5. Compelled Membership And Payment Of Dues Do Not Infringe Rights Of Association .....	C-32
a. <i>Lathrop v. Donahue</i> .....	C-32
b. <i>Roberts v. United States Jaycees</i> .....	C-34
D. The Individual Members Of The Board Of Governors Cannot Be Held Liable .....	C-37
V. CONCLUSION.....	C-40

## TABLE OF AUTHORITIES

## Cases

	<u>Page(s)</u>
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977) .....	<i>Passim</i>
<i>Alford v. Pierno</i> , 27 Cal. App. 3d 682 (1972) .....	C-15
<i>Arrow v. Dow</i> , 544 F. Supp. 458 (D.N.M. 1982) ...	C-27, 28, 30
<i>Auto Equity Sales, Inc. v. Superior Court</i> , 57 Cal.2d 450 (1962) .....	C-27
<i>Bettencourt v. Industrial Acc. Comm.</i> , 175 Cal. 559 (1917) .....	C-10
<i>Chronicle Publishing Co. v. Superior Court</i> , 54 Cal.2d 548 (1960) .....	C-10
<i>Common Cause v. Bolger</i> , ____ U.S. ____, 103 S. Ct. 1888, 77 L. Ed. 2d 280 (1983) .....	C-8, 23, 24, 27
<i>Crawford v. Imperial Irrigation Dist.</i> , 200 Cal. 318 (1927) .....	C-13, 19
<i>DeMille v. American Federation of Radio Artists</i> , 31 Cal.2d 139 (1947), <i>cert. denied</i> 333 U.S. 876 (1948) .....	C-19, 29, 33, 34
<i>Diamond Int'l Corp. v. Boas</i> , 92 Cal.App.3d 1015 (1979) .....	C-16
<i>Ellis v. Brotherhood of Railway, Airline &amp; Steamship Clerks</i> , ____ U.S. ____, 80 L.Ed.2d 428 (1984) ...	C-24, 25, 26, 27, 31
<i>English v. County of Alameda</i> , 70 Cal.App.3d 226 (1977) .....	C-15
<i>Estate of Supple</i> , 247 Cal.App.2d 410 (1966) .....	C-39

## TABLE OF AUTHORITIES

## CASES

Page(s)

<i>Erzinger v. Regents of the Univ. of Calif.</i> , 137 Cal.App. 3d 389 (1982), <i>cert. denied</i> — U.S. —, 103 S.Ct. 3114 (1983) .....	C-12, 13
<i>The Florida Bar Re: Amendment to Integration Rule</i> , No. 61,242 (decided September 22, 1983) .....	C-28
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961) .....	C-31, 32, 33, 34
<i>Lehane v. City and County of San Francisco</i> , 30 Cal.App.3d 1051 (1972) .....	C-16, 17, 19
<i>Miller v. California Commission on Status of Women</i> , 151 Cal.App.3d 693 (1984) .....	C-2, 8, 9, 12, 13, 24, 27
<i>Miller v. Miller</i> , 87 Cal.App.3d 762 (1978) .....	C-18
<i>Mines v. Delvalle</i> , 201 Cal. 273 (1972) .....	C-38
<i>Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.</i> , 59 Cal.App.3d 959 (1976) .....	C-15
<i>Regan v. Taxation With Representation of Washington</i> , — U.S. —, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) .....	C-9, 23, 24, 27
<i>Rhyne v. Municipal Court</i> , 113 Cal.App.3d 807 (1980) .....	C-10
<i>Roberts v. United States Jaycees</i> , 52 U.S.L.W. 5076 (1984) .....	C-32, 34, 35, 36, 27
<i>Sams v. Olah</i> , 225 Ga. 497 (Ga. Sup. Ct. 1969) .....	C-17
<i>Service Employees' Int'l Union v. Roseville Community Hospital</i> , 24 Cal.App.3d 400 (1972) .....	C-10
<i>Stanson v. Mott</i> , 17 Cal.3d 206 (1976) .....	<i>Passim</i>
<i>State Bar of California v. Superior Court</i> , 207 Cal. 323 (1929) .....	C-10

## TABLE OF AUTHORITIES

## CASES

Page(s)

Constitution	
California Constitution, Article VI, § 9 .....	C-8, 9
Statutes	
Bus. & Prof. Code § 6000, <i>et seq.</i> (State Bar Act) ...	C-5, 9
Bus. & Prof. Code § 6001(g) .....	C-13
Bus. & Prof. Code § 6008 .....	C-10
Bus. & Prof. Code § 6028(a) .....	C-14
Bus. & Prof. Code § 6031 .....	C-14, 18, 20, 21
Evid. Code § 200 .....	C-10
Gov't Code § 811.2 .....	C-10
Gov't Code § 53050 .....	C-10
Textbooks	
12 <i>Moore's Federal Practice</i> ¶ 400.05-1 (2d ed. 1982) .....	C-23
Other Authorities	
35 Ops. Cal. Atty. Gen. 112 (1960) .....	C-11
42 Ops. Cal. Atty. Gen. 25 (1963) .....	C-11
51 Ops. Cal. Atty. Gen. 190 (1968) .....	C-11
58 Ops. Cal. Atty. Gen. 29 (1975) .....	C-11



## I. INTRODUCTION

This brief is submitted on behalf of respondents, State Bar of California, Anthony M. Murray, Patricia Greene, Gert K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Loucks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. Davis, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward, and Joon Hee Rho. Respondents respectfully submit that the decision of the trial court was correct, as the relief requested by plaintiffs-appellants is unavailable as a matter of law.

The State Bar, as a governmental agency, is governed by both statutory and constitutional regulations and restrictions. As this brief will demonstrate the applicable constitutional limitations are not those set forth in the labor union cases on which appellants rely; rather, the relevant authority weighing the balance between First Amendment rights and government activities is consistent with the decision below.

Appellants, in attacking the trial court's decision, have mischaracterized the basis of that ruling. While it is true that the Court relied on *Stanson v. Mott*, 17 Cal. 3d 206 (1976), in upholding the right of the State Bar to engage in the challenged activities, the court did not hold that, under *Stanson*, a public agency *could* not violate the First Amendment. (Appellants' Opening Brief ("A.O.B.") at 2.) Rather, the court correctly read *Stanson* as saying that, under the rules established there, the State Bar *had* not violated the First Amendment. That the limits established in *Stanson*, and complied with by the State Bar, are the appropriate limits was clearly restated by this Court

in *Miller v. California Commission on Status of Women*, 151 Cal. App. 3d 693 (1984).

Appellants make a categorical attack on major activities of the State Bar; they do not identify or challenge specific problems. Nor do they seek to remove restrictions on their own right to speak and associate; no restrictions have been imposed. Rather, appellants seek to prevent others from freely speaking and associating. Under the applicable authority of the United States Supreme Court, the California Supreme Court, and this honorable Court, they cannot do so.

The State Bar of California has existed since 1927. It is a creature of the State Constitution as implemented by legislative enactments. California statutes expressly authorize the State Bar to engage in the following range of activities: advancement of the science of jurisprudence; improvement of administration of justice; promotion of relations of the Bar with the public; advancement of the professional interests of the members of the State Bar; and performance of actions necessary to the administration and purposes of the State Bar.

The State Legislature closely supervises the scope of activity of the State Bar. The Legislature reviews the activities of the State Bar each year when authorizing annual fees payable by lawyers for the privilege of practicing law in this State. The legislative consideration of annual State Bar fees bills does not occur in a vacuum; the State Bar presents the activities planned for the year to the Legislature.\* In enacting the annual fees bill, the

---

\*Original Superior Court File ("O.F.") 355-664 and 666-703 are examples of these presentations. In 1982, the fees bill concerned a two-year, rather than a one-year period. (O.F. 666-703.)

Legislature implicitly authorizes the State Bar activity described in the presentation.

The most detailed presentation by the State Bar to the Legislature about its activity occurred in 1981. (O.F. 355-644) This presentation included over thirty individual activities in some ten categories, excluding administrative activities. Although less detailed, subsequent and prior presentations likewise described categories of activities. These presentations show that each of the activities attacked by appellants constitutes a long-standing activity of the State Bar.

In their action, plaintiffs-appellants sought an injunction that if granted would abort a major part of long-performed functions of the State Bar expressly mandated and implicitly approved by the Legislature. The authority they cite does not, however, support the relief they requested.

## II. ISSUES PRESENTED

This appeal raises the following issues:

- 1) May individuals restrain a governmental entity from taking positions with which they may disagree because such individuals are obligated to fund that entity through a legislatively-mandated tax;
- 2) Does the explicit and implicit authority given to the State Bar as a governmental entity permit the activities of which appellants complain; and
- 3) May individual members of the governing authority of a governmental entity be held personally liable where there is no allegation or evidence that their actions were not taken in good faith.

Respondents submit that each of these questions has been decided in controlling precedent from the United States Supreme Court, and the California courts, in favor of the State Bar and the members of its Board of Governors, and that the decision of the court below should therefore be affirmed.

### III. STATEMENT OF FACTS

#### A. Procedural History

This action has been filed by 21 individual members of the State Bar of California, who seek to enjoin a broad range of activities by the State Bar to which they apparently object. According to appellants, the use of the fees they must pay as a result of the legislative authorization of the State Bar as an integrated bar, for activities they disapprove of, violates their First Amendment rights. Appellants seek to enjoin the State Bar from proceeding with its activities outside of the area of admissions, discipline, and regulation.

A temporary restraining order and order to show cause was entered on October 26, 1982. Respondents were ordered to show cause why they should not be enjoined during the pendency of the action from using the revenue from State Bar fees, or the name of the State Bar, "to promote any particular ideologies regarding judicial retention elections or other elections." The Court further ordered that, pending the hearing, respondents were restrained from using revenue derived from the named appellant's State Bar fees to "promote any particular criteria regarding the evaluation of judges and judicial retention elections." (O.F. 234-36.)

That order was superseded by an order continuing the hearing from November 29, 1982, to January 28, 1983.

Pursuant to stipulation, pending the hearing the respondents deposited a sum equal to the mandatory State Bar fees of all the plaintiffs named in the complaint as of December 2, 1982 in a trust account.\* (O.F. 241-42.)

Appellants' motion for preliminary injunction was heard on January 28, 1983, and denied on March 4, 1983. (O.F. 983-85.) On November 22, 1983, following extensive discovery, respondents' motion for summary judgment was filed. Plaintiffs filed a Motion for Partial Summary Judgment on November 23, 1983. Plaintiffs' motion was denied on March 19, 1984. (O.F. 1752-53.) Judgment was granted in favor of all defendants on May 24, 1984. (O.F. 1754.) After plaintiffs unsuccessfully sought a writ of mandate, they filed a notice of appeal to this Court on June 18, 1984. (O.F. 1759.)

#### B. The History Of The State Bar And Its Activities

The State Bar was created in 1927 by the State Bar Act, Bus. and Prof. Code § 6000, *et seq.* Throughout its history, the State Bar has remained subject to the provisions of this statute. In 1960, the status of the State Bar was altered when the voters approved a ballot proposition making the State Bar a constitutional entity. A similar vote in 1966 maintained this status. (O.F. 292-93; 300.)

The creation of the State Bar in 1927 was in part prompted by concerns about inadequate professional standards and competence and by widespread recognition of the need for assistance in legal reform and improvement of judicial administration. Reference to the records of the State Bar shows that the State Bar immediately began activities to address these concerns and that many

---

\*The complaint was amended again, on January 13, 1983, after the Court's Order, to add additional plaintiffs.



of the programs begun by the State Bar in its early years have lasted in one form or another over the 50 years in which the State Bar has been in existence. For example, even in the earliest years of the Bar, and throughout its history, there have been programs to improve delivery of legal services to the poor, to promote reform in procedural and substantive areas of law, and to educate the public about issues affecting the State Bar. (O.F. 293-303.)

With regard to the issues raised in this lawsuit, State Bar records show that the types of activities challenged by plaintiffs here have been part of State Bar programs for many years. For example, from its inception, the Bar organized sections of members to study and propose legal reform. One of the areas addressed at that time was judicial selection and conduct. In the 1930s, the State Bar was instrumental in gaining adoption of standards for judicial selection in California. More recently the Bar has assisted in programs of judicial evaluation. Thus, activities to maintain the independence and integrity of the judiciary are not new to the State Bar. (O.F. 293-98.)

Similarly, legislative activity is not new to the State Bar. One of the most effective ways in which the State Bar can fulfill its obligations to advance the science of jurisprudence and to improve administration of justice is to suggest and promote legislation. In the early years of the Bar, members of sections studying potential legal reform were encouraged to lobby for reform. The members of the Board of Governors and Secretary of the State Bar also lobbied for adoption of legislation recommended by Bar sections. (O.F. 294-95.)

Programs to encourage participation of State Bar members in State Bar activities and programs to obtain the input of State Bar members in decisions made by that organization have also been of long standing in the State

Bar. In fact, the predecessor program to the Conference of Delegates began in the 1930s. (O.F. 295.)

These are just a few examples of how the categories of work of the State Bar have since its beginnings remained relatively constant. These examples also underscore the fact that the activities challenged by petitioners are longstanding practices of the State Bar. These practices, and the other activities of the State Bar are reviewed annually by the Legislature in conjunction with its approval of the State Bar's fees bill. The Bar has continually played a significant role in providing the legislative and executive branches with information and assistance in areas of its particular expertise.\*

### C. The Complaint

The complaint sought to enjoin all activity of the State Bar encompassed in the following categories:

- (a) lobbying the California Legislature;
- (b) submitting briefs *amicus curiae*;
- (c) financing meetings of the Conference of Delegates;
- (d) publicizing the speeches by the President of the State Bar; and
- (e) financing the public information project on judicial retention.

---

\*A detailed discussion of the history of the State Bar and its activities, setting forth the matters discussed above, is included in the Declaration of Magdalene Y. O'Rourke filed in the trial court. (O.F. 289-303.)

Complaint, ¶ 6, C.T. 3-4. Appellants did not challenge any specific activity in any of the enumerated classes. Their attack was, and is, categorical.

The complaint also sought to hold the individual members of the Board of Governors liable for past expenditures of the State Bar utilized to finance its activities in these categories. Appellants sought reimbursement of all fees expended for "political and ideological purposes" (Prayer, ¶ 3, C.T. 5-6), without further specifying those activities.

#### IV. ARGUMENT

Respondents assert, for the following reasons, that appellants were not entitled to the relief they sought, and that the decision of the court below was correct as a matter of law:

1. the State Bar is an agency of the California state government created by Article VI, § 9 of the California Constitution and implementing legislation;

2. because the State Bar is an agency of the government it has all powers expressly or implicitly granted it by the Constitution and statute, limited only by restrictions imposed by the Constitution. *Stanson v. Mott*, 17 Cal.3d 206 (1976); *Miller v. California Commission on Status of Women*, 151 Cal.App.3d 693 (1984);

3. each category of State Bar activity and each specific activity of the State Bar mentioned in the complaint is expressly or implicitly authorized by the California Constitution and the State Bar Act. This authorization is confirmed annually by the Legislature in enacting legislation providing for financing

the State Bar after receiving the agency's proposed budget for the ensuing year;

4. no constitutional restriction precludes the State Bar from engaging in the categories of activity described in the complaint or the specific functions mentioned in it. To the contrary, two recent decisions of the United States Supreme Court reject the constitutional attack mounted by plaintiffs. *Regan v. Taxation with Representation of Washington*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); *Common Cause v. Bolger*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983);

5. the authorities upon which appellants rely are inapplicable to agencies of government. They are pertinent only to the affairs of private organizations; and

6. a controlling decision of the California Supreme Court mandates rejection of appellants' claim that the individual members of the Board of Governors of the State Bar are liable. *Stanson v. Mott*, *supra*. This Court has recently rejected an indistinguishable challenge on the same grounds. *Miller*, *supra*.

#### A. California Law Permits A Public Entity, Such As The State Bar, To Engage In The Type Of Activities In Which The State Bar Engages

##### 1. The State Bar is a Public Entity.

Article VI, § 9 of the California Constitution establishes the State Bar of California as a public corporation. The parallel legislative enactment, establishing the State Bar as a public corporation, and enumerating its powers, is the State Bar Act, Bus. & Prof. Code § 6000, *et seq.* The



California Supreme Court upheld the constitutionality of the State Bar Act, and the establishment of the State Bar as a public corporation, in *State Bar of California v. Superior Court*, 207 Cal. 323 (1929).

Public corporations constitute public entities. See *Service Employees' Int'l Union v. Roseville Community Hospital*, 24 Cal.App.3d 400, 407 (1972); *Bettencourt v. Industrial Acc. Co.*, 175 Cal. 559, 561 (1917). Like other public entities, the State Bar was created to serve governmental purposes and was accordingly vested with governmental powers. It is charged with the duty of regulating the profession and practice of law, a subject which "is essentially . . . a matter of public interest and concern . . ." *State Bar of California v. Superior Court*, *supra*, 207 Cal. at 331.

Because the State Bar is a public entity, its property is exempt from taxation. As the Legislature has declared, such property is "held for essential public and governmental purposes in the judicial branch of the government . . ." Bus. & Prof. Code § 6008. The members of the Board of Governors are public officers acting under oath. *Chronicle Publishing Co. v. Superior Court*, 54 Cal.2d 548, 566 (1960). These governmental powers, purposes, and attributes demonstrate clearly that the State Bar is a public corporation in fact as well as in theory, and that it is dedicated to public, not private ends. See *State Bar of California v. Superior Court*, *supra*, 207 Cal. at 330-32. Moreover, as a matter of general policy, public corporations are deemed to be public entities. See Gov't Code § 53050; Gov't Code § 811.2; Evid. Code § 200; *Rhyne v. Municipal Court*, 113 Cal.App.3d 807, 824-25 (1980).

Thus, the State Bar, a creature of California constitutional and statutory law, is, as a matter of California law, a public entity. Specific standards have been developed in

California defining the range of activities in which public agencies may properly engage. As demonstrated below, those standards clearly authorize the State Bar to engage in the full range of activities challenged in this lawsuit.

## 2. Public Entity Authority Is Tested By The Implicit And Explicit Powers Granted To The Agency By The Constitution And Legislative Action

### a. *Stanson v. Mott*

The powers of public agencies in California were described at length in *Stanson v. Mott*, 17 Cal.3d 206 (1976). In that case, a taxpayer challenged the expenditure of funds by the State Department of Parks & Recreation to promote the passage of a ballot proposition. In confirming the authority of the Department to expend funds for lobbying and public information related to ballot propositions, the court first examined the scope of the authorization given to the agency to expend funds. This analysis was required by "the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment." 17 Cal.3d at 213. In determining whether the challenged activity was proper, the court looked to the various legislative authorizations pertaining to the Department.

Various opinions of the Attorney General of California have applied this same analysis to determine the propriety of expenditure of public funds under various circumstances. See, e.g., 58 Ops. Cal. Atty. Gen. 29 (1975); 51 Ops. Cal. Atty. Gen. 190 (1968); 42 Ops. Cal. Atty. Gen. 25 (1963); 35 Ops. Cal. Atty. Gen. 112 (1960).



b. *Miller v. California Commission*

Appellants' assertion that *Stanson* addresses only statutory authorization questions, and does not decide the constitutional issues, is clearly wrong. The Court expressed specific concern about necessary limits on government activity, 17 Cal.3d at 218, and, accordingly, set such limits. Compliance with those limits answers the constitutional questions raised by appellants, as this Court specifically reiterated in *Miller v. California Commission*, *supra*.

In *Miller*, plaintiffs raised a constitutional challenge to the advocacy activities of the Commission on the Status of Women, a tax-funded agency. They claimed that its action in support of principles with which they disagreed violated their First Amendment rights. The Court rejected this Proposition, holding that the government could not be prevented from speaking because of taxpayer disagreement. 151 Cal.App.3d 700-701. Indeed, the democratic process requires the government to speak. *Id.* Only where the entity does not comply with the limits set forth in *Stanson*, or drowns out the individuals, is a problem raised. 151 Cal.App.3d at 700-702. Neither situation is present here; the State Bar has complied with *Stanson*, and appellants do not claim, nor can they, that they are unable to make their views heard.

Appellants assert (A.O.B. at 2) that *Miller* does not apply, as the entity involved was funded by general taxation, rather than a special tax imposed on a limited group. That distinction is irrelevant, however. First, *Miller* itself draws the relevant distinction — between governmental entities, such as the Commission and the State Bar, and private organizations such as labor unions. 151 Cal.App.3d at 700. Second, the rules applied by *Miller* have been applied to governmental entities supported by a special tax or fee. See *Erzinger v. Regents of the Univ. of*

*Calif.*, 137 Cal.App.3d 389, 392 (1982), *cert. denied* — U.S. — (1983). Finally, in terms of the relief suggested by the *Miller* court, redress from the Legislature, the individual member of the State Bar has an even broader right in his ability both to vote to affect the policies of the Bar by changing the membership of the Board of Governors and to seek legislative redress.

3. The Legislative Authority Explicitly And Implicitly Authorizes The Full Scope Of Current State Bar Activity

a. The Specific Authorization is Broad

Like those of other California governmental agencies, the State bar's limits are established by reference to the authorization given to it by the Legislature and the people of California. In the case of the State Bar this authorization comes from both the constitutional enactment of its existence and the legislation directing it. Like any other public corporation, the State Bar:

"[D]erives its powers from the statute under which it is created and acts, and from such other statutes as may have been enacted by the legislature granting it additional powers or limiting those already granted." *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318, 326 (1927).

The legislative authorization for the California State Bar is both clear and broad. Among other things, the State Bar is empowered to "Do all . . . acts . . . necessary or expedient for the administration of its affairs or the attainment of its purposes." Bus. & Prof. Code § 6001(g). The Board of Governors of the State Bar is likewise authorized to "make appropriations and disbursements from the funds of the State Bar to pay all necessary

expenses for effectuating the purposes of this chapter." Bus. & Prof. Code § 6028(a). Finally,

"The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." Bus. & Prof. Code § 6031.

Appellants could not and did not show that any of the challenged activities of the State Bar are outside of the scope of its authorization. Rather, appellants wish to enjoin State Bar activity solely by claiming that, because they may disagree with some or all of the positions of the State Bar, the State Bar may not use their funds to engage in such activities.

b. The Activities Of The State Bar Have Been Specifically Approved By The Legislature And The Voters

The State Bar has engaged in the activities appellants challenged since its creation. The Legislature has scrutinized these activities annually in conjunction with its approval of the State Bar's fees bill. Thus, with full knowledge of these activities, the Legislature and the people of California have maintained the State Bar Act in effect. In determining whether the challenged activities are appropriate and are within the scope of the State Bar's proper functions as a state agency, the court below was entitled to give great weight to this consistent legislative support of the activities of the State Bar.

The intent of the Legislature in enacting the State Bar Act is also of great import in determining the scope of the State Bar's powers.

"It is well settled that in construing statutes the court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. In the course of this procedure the court must take into account a variety of factors, such as the context of the legislation, its objectives, the evils to be remedied, and public policy (citations omitted). The cases are not less emphatic that contemporaneous construction of the legislation may also be considered." *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.*, 59 Cal.App.3d 959, 973 (1976) (citations omitted).

See also *Alford v. Pierno*, 27 Cal.App.3d 682, 688 (1972).

Administrative construction of a statute and administrative practice are likewise entitled to great weight in ascertaining the meaning of the Legislature's actions. *English v. County of Alameda*, 70 Cal.App.3d 226, 240 (1977). Thus, the actions of the Legislature, both in reenacting the State Bar Act, and in approving the Bar's activities every year in enacting the fees bill, are entitled to be weighed heavily in the determination of the appropriate scope of the State Bar's authority. The State Bar's annual presentation in conjunction with its fees bill is explicit evidence of the Legislature's acute awareness of its activities.

Further, in 1960 and in 1966 the electors of California enacted Constitutional propositions to establish and maintain the State Bar as a Constitutional agency. In both elections the voters approved the State Bar's Constitutional status. The material submitted to the voters in these elections in support of, and in opposition to, the ballot propositions was submitted to the court below. (O.F. 893-903; 905-11.) Those materials, important in ascertaining the intent of the electorate, constitute powerful evidence that the concept of a State Bar, as a body



with the powers approved by the Legislature, was fully supported by California voters. *See Diamond Int'l Corp. v. Boas*, 92 Cal.App.3d 1015, 1034 (1979).

#### 4. Appellants Have Failed To Show That The Challenged Activities Are Outside The Scope Of The State Bar's Authorization

Appellants essentially object to activities in the following five areas: (a) lobbying; (b) submitting *amicus curiae* briefs; (c) financing meetings of the Conferences of Delegates; (d) publicizing speeches of the President of the State Bar; and (e) distributing public information on judicial retention. (Complaint, ¶ 6, O.F. 3-4; A.O.B. at 3-4.)

Significantly, however, appellants have identified no areas beyond the scope of the legislative and constitutional authorization of the State Bar. In fact, all of the matters to which they object are within the scope of authorization for the State Bar.

Appellants seek to, but may not, stop the State Bar from engaging in activities because appellants apparently disagree with the positions taken by the Board of Governors, chosen in a democratic manner to set such policies. (O.F. 257-58.) Apparently appellants seek to use the catch phrase "political and ideological" to describe, and halt, any positions or activities with which they disagree. Such disagreement does not permit the silencing of the entire Bar.\* *See Lehane v. City and County of San Fran-*

\*Indeed, appellants' position would prohibit all government from functioning if the disagreement of a taxpayer with a position taken could halt an entire program. No government entity, including the Judicial Council, could lobby; the Attorney-General's office could not file *amicus* briefs. However, as has been demonstrated above, that result is not permitted by law.

cisco, 30 Cal.App.3d 1051, 1056 (1972). This doctrine has been clearly recognized outside of California as well.

"It is true that [a member of the State Bar] is required to contribute to the cost of the operation of the State Bar, and he may not agree with all of the policies as determined by its Board of Governors. The Board of Governors is selected in a democratic manner.

It is frequently true in a democratic society that the wishes of the minority are overruled, even though they must contribute to the cost of the programs carried forward by the majority." *Sams v. Olah*, 225 Ga. 497, 505 (Ga. Sup. Ct. 1969).

In *Sams*, the court concluded that the test for illegal expenditures is not a broad test of whether the funds are being spent contrary to the individual's wishes, but rather whether the funds were spent for the authorized purposes of the State Bar. 225 Ga. at 507. By this reasoning, the most appellants could seek to bar would be those activities demonstrably outside of the activities authorized by the Constitution and the Legislator. None of the activities objected to, however, are unauthorized.

#### a. Lobbying

Appellants have challenged the entire lobbying program of the State Bar, without attempting to show that any of this lobbying is outside the scope of the Bar's authority. They thus attack no specific aspect of the State Bar's program of legislative advocacy, but simply the right of the State Bar to engage in any lobbying activity at all. Lobbying by public agencies is clearly permitted under California law, so long as the lobbying is in areas within the authorized jurisdiction of the agency.



Lobbying of the Legislature concerning issues within the scope of Bus. & Prof. Code § 6031 has the explicit and implicit approval of the Legislature. It is explicitly approved on an annual basis by means of the fees bill, as set forth above. It is implicitly approved by prevailing California case law, exemplified by the leading case of *Stanson v. Mott, supra*.

Having examined the scope of legislation governing the state agency under consideration in *Stanson*, the court concluded that there had been no specific authorization for the use of public funds in the election campaigns at issue in that case. The court distinguished such expenditures from the use of funds for lobbying efforts, and noted specifically that lobbying efforts were authorized even though certain of the causes advocated might be those which some members of the public might not support:

"[T]he legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute... in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave to the 'free election' of the people... does present a serious threat to the integrity of the electoral process." 17 Cal.3d at 218.

See also *Miller v. Miller*, 87 Cal.App.3d 762, 767 (1978).

The *Stanson* court made clear that even the prohibition against election campaigning did not preclude the agency from incurring any expense in connection with the election. The agency was implicitly authorized, the Court

held, to expend funds to inform potential voters. 17 Cal. 3d at 220-21. Indeed, the court stated that

"[I]t would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity." 17 Cal.3d at 221 n.6.

Thus, the court permitted a "fair presentation of facts" but prohibited, as had earlier courts, exhortations to the voters to vote in a certain manner. The standard for the determination of propriety was established as:

"a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." 17 Cal.3d at 222.

Within the limits set by the legislature authorization of the agency, an agency may properly expend funds for purposes related to the agency's mandate so long as the power of the government is not brought to bear unfairly upon the electoral process. The power of agencies to lobby the Legislature, however, is specifically permitted. See *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318, (1927); *Lehane, supra*.

"If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of a government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in others, his recourse is to vote against them." 30 Cal.App.3d at 1056. See also *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139 (1947) cert. denied 333 U.S. 876 (1948). (majority rule permits imposition of

an assessment despite disagreement by a member with the purposes for which the assessment is levied).

Appellants obviously do not dispute that they can not only vote for state legislators, but also vote in State Bar elections, and participate in State Bar activities. Like all other members of the State Bar, they may attempt to affect policy through established mechanisms, but they may not impose their will upon the majority, or stifle the speech of the majority.

#### b. *Amicus Curiae* Briefs

Appellants' challenge to the State Bar's program of submitting *amicus curiae* briefs is unsupported by any showing that the program is outside of the Bar's specific authorization to advance the science of jurisprudence and to improve the administration of justice.\* Again, appellants attack no specific aspect of the State Bar's *amicus* brief program but rather its authority to file *amicus* briefs in general. Certainly *amicus* briefs related to "the science of jurisprudence" and "the administration of justice" can be filed in keeping with the functions of the State Bar. Bus. and Prof. Code § 6031. The presentation of positions to a Court in a broad variety of cases parallels the legislative advocacy approved in *Stanson*; the rationale of that case is applicable.

Appellants' free speech or associational interests are in no way infringed by the *amicus* program. Appellants obviously do not contend that they cannot themselves file *amicus* briefs if they disagree with any position advocated

---

\*O.F. 850-51 is a copy of the procedures and guidelines for the *amicus* program.

by the State Bar; as with lobbying, their individual participation is in no way prohibited.

#### c. The Conference of Delegates

The Conference of Delegates is an integral part of the democratic organization of the State Bar, providing a forum for the collegial discussion of causes by representatives of the lawyers of California.\* Appellants attack no specific aspect of activity of the Conference of Delegates, and they point to no facts showing that the function of the Conference is outside the scope of authorized activities under Bus. & Prof. Code § 6031. Appellants have also not demonstrated that they are unable to have their views heard and considered by the Conference. Their objection apparently is that at the Conference a majority view may prevail, or unpopular views may be expressed; they therefore seek to enjoin the free speech of their fellow lawyers.

#### d. President's Speeches

Again appellants' attack is general, as they seek to enjoin *all* dissemination by the State Bar of the speeches of its President. The Bar is charged with undertaking activities concerning its relations with the public. Giving the public access to knowledge of the policies and activities of the Bar through the speeches of its President, along with other educational activities, is thus explicitly within the Bar's mandate and within the scope of activity permitted by *Stanson, supra*.

---

\*O.F. 853-91 is a copy of the Conference of Delegates Handbook for 1982. This exhibit describes the Conference of Delegates program.



### e. Public Information on Judicial Independence

Materials describing the public information project on judicial independence were submitted to the court below. O.F. 743-833. These documents demonstrate clearly that as to style, tenor, and timing, this ongoing project constitutes an effort by an informed agency to educate the public, fully, fairly, and impartially as to matters within its expertise. Under *Stanson v. Mott* and the other relevant authority, such a program is not only permissible, but is appropriate and socially desirable. Indeed, in light of its legislative mandate, such a program may, in fact, be an obligation of the State Bar. While it is true that an information program designed to inform the public of the fundamental characteristics of the judicial function and of the historical foundation of an independent judiciary may be said to promote an ideology, this is an ideology intimately connected with the science of jurisprudence and the administration of justice.

Once again, however, appellants seek to enjoin an entire program without alleging or putting forth any evidence that the materials assembled for that project are anything other than a fair presentation of facts and of such style and tenor that they constitute a proper attempt to inform the voters about issues concerning which the Bar has special knowledge and unique responsibilities. Rather, appellants merely assert that the project is political or ideological and thus improper. That bare assertion is incorrect.

### B. The Challenged Activities Are Constitutional

Two recent decisions of the United States Supreme Court further clarify the right of a governmental entity to engage in speech activities, even though such activities are financed by taxes. The government may, in certain

instances, use tax dollars to subsidize issue-oriented speech regardless of whether there is any compelling governmental interest to support this decision. Only a rational relationship to legitimate governmental purposes is required. *Regan v. Taxation With Representation of Washington*, \_\_\_ U.S. \_\_\_, 76 L.Ed.2d 129, 138-40 (1983). The same test is mandated by the applicable California authority cited above, and governs this case.

In addition the Supreme Court affirmed without opinion the decision of a three-judge District Court in *Common Cause v. Bolger*, \_\_\_ U.S. \_\_\_, 77 L.Ed.2d 280 (1983).<sup>\*</sup> In that case, the Court held that incumbent legislators may use the franking privilege without violating the constitutional rights of voters and nonincumbents despite the greater impact thus given to the incumbent's speech. The Court declined to apply a strict scrutiny analysis, because any restriction on First Amendment rights was indirect and, because it applied to all non-incumbents, was not content-related. The same is true here; any restriction is indirect and applies to all who disagree with the majority position on a broad spectrum of issues, not to any particular position.

The State Bar speaks as a government agency and must be governed by this law in all respects. Although plaintiffs allege that the State Bar purports to represent the views of its individual members, that claim is demonstrably without basis in fact and is merely an unsupportable conclusion. The State Bar speaks as a constitutional and statutory body. See O.F. 1139-40, 1141-42, 1612-13.

---

<sup>\*</sup>Such a summary affirmance is a resolution on the merits and constitutes precedential authority. See 12 *Moore's Federal Practice* ¶ 400.05-1 (2d ed. 1982).



The important governmental interest in the free flow of information validates each of the State Bar's activities complained of. *Regan* and *Bolger*, which are in complete accord with the ruling of the California Supreme Court in *Stanson*, *supra*, of this Court in *Miller*, *supra*, and the other authority cited, required the Court below to decide this case in favor of the State Bar; that decision should therefore be affirmed.

C. The Cases On Which Appellants Rely Do Not Affect The Controlling Case Law

Appellants seek by this action to enforce a "negative" First Amendment right — to prevent the speech of others with whom they disagree, and not to protect against any abridgement of their own speech. As we have demonstrated, this attempt is unsupported by the applicable law. The cases on which appellants rely are clearly distinguishable. These cases deal either with state-compelled financing by individuals of private organizations where the obligation to finance is limited to activities germane to the governmental interest justifying compulsion (A.O.B. at 5-8, 9-13) or "positive" First Amendment rights infringed by prevention of a person's own right to speak and associate. (A.O.B. at 8-9.)

1. *Abood v. Detroit Board of Education*

Appellants rely primarily on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). However, *Abood* deals with compelled exactions paid by nonmembers to a private organization, in that case a labor union, and holds only that those exactions cannot be compelled for a purpose unrelated to the purpose for which organization was formed, or to discourage free-riding and the consequent labor strife. *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, — U.S. —, 80 L.Ed.2d 428

(1984), which refined *Abood*, however, imposes severe restrictions upon those nonmembers who seek to negate the First Amendment rights of members.

*Abood* held, in pertinent part, that non-members of a labor union could not be constitutionally compelled to contribute to ideological causes they opposed. The Court held, however, that plaintiffs were not entitled to an injunction because of its effect upon the First Amendment rights of union members. 431 U.S. at 238. Instead, the Court limited plaintiffs to a mechanism that would limit fees, excluding the portion of the fees used for purposes other than those for which the union was formed. Except as it imposes such constitutionally mandated restrictions upon the injunctive remedy, *Abood* is otherwise inapplicable to the case at bar.

The difference in the nature of the payment to the private organization in *Abood* and the tax paid as fees to the governmental entity by California lawyers distinguishes the case at bar from that portion of *Abood* which provides for a limitation on dues. Plaintiffs in *Abood* were government employees who were not members of a union which had negotiated a collective bargaining agreement with the Board of Education. The agreement provided for an "agency shop," in which those employees who elected not to become members of the union were nevertheless obligated to pay the equivalent of union dues to it. This payment was designed to prevent unjust enrichment to the nonunion employee who otherwise would receive the benefit of union representation for which the union members had paid. 431 U.S. at 222.

The result in *Abood* is a direct result of an inherent limitation in the principle which allows governmental compulsion of payments to the private union in the first instance. The allowance of an agency shop as a condition

to government employment can only be justified by the special needs and benefits to be gained from that arrangement in a labor context. Thus, the First Amendment violation in *Abood* was the direct product of the use of non members' fees for purposes beyond the scope of the benefits that justified the agency shop.

The State Bar of California is not comparable to a labor union. The obligation of lawyers, each of whom is a member, to pay to finance the functions of the State Bar is imposed by constitution and statute, not contract. State Bar fees are in reality a special tax imposed upon those permitted to practice law in this State. Unlike the union in *Abood*, the State Bar has the power to exact fees from all active California lawyers, derived from the State's power to tax. The pertinent scope of authority to expend this tax is that applicable to public entities and not that applying to private organizations acting by agreement with government.

## 2. *Ellis v. Brotherhood*

*Abood* was refined by the Supreme Court in its decision in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, \_\_\_ U.S. \_\_\_, 80 L.Ed.2d 428 (1984). That case, involving governmentally compelled dues pursuant to the Railway Labor Act, determined that only certain expenses, necessarily and reasonably incurred for the purposes of the duties of the union as exclusive bargaining representative, were statutorily permitted. 80 L.Ed.2d at 442. As to such activities, the Court found that the First Amendment posed no barrier to the use of compelled funds, as any interference with protected rights was justified by the governmental interest in industrial peace. 80 L.Ed.2d at 446-47. In making this determination, the Court cautioned that flexibility in the use of compelled

funds must be maintained. 80 L.Ed.2d. at 447, citing *Abood*.

Both *Abood* and *Ellis* hold only that the state action compelling payments used by a private organization to subsidize speech must be supported by some governmental interest which justifies the compulsion. Neither case requires that that interest be compelling, and neither requires that more narrowly drawn restrictions on the objectors' rights be substituted. In each case, the governmental interest was narrow — the preservation of labor peace and collective bargaining.

As *Regan* and *Bolger* demonstrate, however, where taxes are involved the governmental interest is broad. As long as an individual's freedom to speak is not restricted, the power to spend is vested in the legislative branch, and not the courts.

## 3. *Arrow v. Dow*

Appellants' reliance upon *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982) is badly misplaced. In that case, a federal district court in New Mexico held that the integrated bar of New Mexico could not engage in certain specified lobbying activities if those activities were financed with mandatory dues collected by the New Mexico Bar Association. We submit that the decision of this Court in *Miller, supra*, rather than that of a single federal trial judge in *Arrow* is the persuasive authority. A decision of the district court of New Mexico is not binding on this honorable Court. To the extent that it is inconsistent with decisions of the California Supreme Court and Courts of Appeal, the case must simply be disregarded. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450 (1962). The facts of *Arrow* are obviously different from



the facts here, and the case was wrongly decided in any event.

*Arrow* does not concern the State Bar of California, which is established by the state Constitution and statute; *Arrow* concerns the integrated bar of New Mexico, a creature of a rule of court. Nothing in *Arrow* even suggests that the judicially authorized integrated bar association of New Mexico is charged with the broad scope of public duty imposed upon the California State Bar by the Constitution and statutes of this State. The *Arrow* court held that the New Mexico Bar Association could not assert as authority for its lobbying activity a general duty of lawyers to evaluate and give advice to the public on issues related to the administration of justice or improvement of the legal system. The California State Bar, however, relies for its authority not upon some general duty, but upon the Constitution of this State and the powers expressly and implicitly granted by the Legislature. The analysis of the New Mexico bar is accordingly irrelevant to California.

Moreover, *Arrow* was simply decided incorrectly. Although it purports to follow *Abood*, *Arrow* ignores the Supreme Court's explicit proscription against injunctive relief which, by restraining organization speech, would impinge upon the First Amendment rights of the majority in the organization. Any validity given to *Arrow* is seriously in question following the decision of the Supreme Court in *Ellis*, further restricting the negation of First Amendment rights of members that *Arrow* approved.

The broad reading adopted by the *Arrow* court has also been rejected by the Florida Supreme Court. In *The Florida Bar Re: Amendment to Integration Rule*, No. 61,424, decided September 22, 1983, that Court held that political activity by its bar, established by rule of Court,

was within the defined purpose of the bar "to improve the administration of justice, and to advance the science of jurisprudence." Opinion at 2.\* The Court, in determining whether the challenged activities were germane, looked broadly at purpose, as the *Arrow* court failed to do.

#### 4. Even If *Abood* Were Held To Apply, The Requested Relief Would Not Be Available

Even if the principles that *Abood* stated for private organizations were held to apply to the governmental entity involved here the relief sought would not be permissible. If *Abood* applied here, no public entity in California could act in the future. Any citizen paying taxes to support any entity could avoid payment of his taxes any time such agency presented a position with which he disagreed. Such a result would be crippling:

"Majority rule necessarily prevails in all constitutional government including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles, the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation because of a difference in personal views." *DeMille v. American Fed. of Radio Artists*, 31 Cal. 2d 139, 150 (1947), cert. denied, 333 U.S. 876 (1948).

---

\*A copy of this opinion is attached hereto as Appendix A for the convenience of the Court.



a. The Decision In *Abood* Does Not Permit An Injunction Against The State Bar

Appellants ignore two vital aspects of *Abood*. First, *Abood's* prohibition of compulsory contribution was limited to expenditures which were both not germane to the union's duties as a collective bargaining representative and promoted political or ideological causes. Even as to those areas, however, the Court did

"[N]ot hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of the loss of governmental employment." 431 U.S. at 235-36.

Thus, denial of the broad injunctive relief sought was upheld. 431 U.S. at 241.

b. *Abood* Limits Relief to Activities Which Are Not Germane To the Propose For Which The Organization Is Formed

In addition, appellants have made no attempt to demonstrate that the challenged activities are not germane to the purposes for which the State Bar was formed, as those purposes are defined by the California Constitution and the relevant sections of the Business and Professions Code. Instead, appellants rely on *Arrow*, which declares that any activity outside of the very narrow range of admissions, discipline, and regulation is not germane. This approach, however, fails utterly to meet the

burden placed upon plaintiffs by both *Abood* itself and the interpretation of that ruling in *Ellis*. That the *Arrow* court elected not to address this issue does not excuse appellants from this burden.

Appellants assert that *Lathrop v. Donohue*, 367 U.S. 820 (1961) supports their belief that "the elevation of educational and ethical standards" are the sole permissible activities of a unified Bar. (A.O.B. at 13.) However, an analysis of *Lathrop* shows that the reference made by the Court was to "improving the quality of the legal service available" and to "raising the quality of professional services." 367 U.S. at 843. In concluding that this defined interest was met by the activities of the Wisconsin bar, the Court reviewed those activities extensively, citing the purposes as stated in the bylaws:

"to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged." 367 U.S. at 828-29.

The Court's review of the activities and policies of the Wisconsin Bar shows programs very similar in scope and content to the activities complained of here, including lobbying and the establishment and support of sections and committees. 367 U.S. 829, n. 7, 834-842. Thus, *Lathrop*

provides no support for appellants' attempt to impose their own beliefs on the majority of the State Bar.

#### 5. Compelled Membership And Payment Of Dues Do Not Infringe Rights of Association

The claim that compelled membership in and payment of dues to an integrated state bar infringes rights of association has already been considered and rejected by the United States Supreme Court in *Lathrop v. Donohue*, *supra*. No new authority calls into question the holding of *Lathrop* and in fact a recent Supreme Court case addressing rights of association supports the trial court's finding in this case that the State Bar has not infringed appellants' rights. See *Roberts v. United States Jaycees*, 52 U.S.L.W. 5076 (1984).

##### a. *Lathrop v. Donohue*

Appellants attempt to underplay the significance of the precedent of *Lathrop* by focusing their discussion of the case on the Court's failure to reach a decision on the free speech issues raised in this case. The Court, however, did decide that associational rights were not infringed by association with and payment of dues to an integrated state bar, the activities of which were very similar to those of the California State Bar.

In upholding the constitutionality of the integrated bar of the State of Wisconsin, a four-justice plurality of the Supreme Court specifically held that the only compulsion involved was the compelled financial support represented by the payment of dues, not any other membership activity. The membership requirement was held to infringe no associational rights. 367 U.S. at 828, 842. In their concurring opinion, Justices Harlan and Frankfurter reached the same conclusion. 367 U.S. at 850-51.

Members of the State Bar in California are compelled only to pay their membership fees. Like the lawyers in *Lathrop*, they are not compelled to attend meetings, to voice affirmation for any position taken by the State Bar, to refrain from speaking in opposition to positions taken by the State Bar, or even to vote on issues on which they are entitled to vote as members of the State Bar. 367 U.S. at 828. Appellants do not contend otherwise. Thus, on the associational issue, *Lathrop* is the persuasive authority.

In emphasizing the multifaceted aspect of the Bar's endeavors, the plurality opinion concluded that:

"Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." 367 U.S. at 843.

Although the Court in *Abood* noted that it did not believe that the majority in *Lathrop* had agreed on any proposition other than that the constitutional issue should be reached, 431 U.S. at 233, n. 29, that statement must be read in the context of the narrow issues presented in *Abood*. The question that was not decided by the Court in *Lathrop* concerns infringement of rights of speech.

That question was determined in California in *DeMille*, *supra*, which rejected plaintiff's contention that the fee requirement was unconstitutional because it represented compulsory expression. The contribution was not an individual expression of the views of the plaintiff, the Court held, nor was the use of the fund a use of his money to express his views:

"The member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest. 'Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union.' " 31 Cal. 2d at 149 (citations omitted).

The Court also observed that, in an organization,

[m]ere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods. And compliance — here payment by the plaintiff of the assessment — would not stamp his act as a personal endorsement of the declared view of the majority.\* *Id.* at 150.

Thus, *Lathrop* is authoritative and consistent with *DeMille*. If, however, the *Aboud* footnote were read broadly to limit the decision in *Lathrop*, the opinions expressed by a majority of the members of the *Lathrop* court are fully consistent with controlling California authority.

b. *Roberts v. United States Jaycees*

In *Roberts v. United States Jaycees*, 52 U.S.L.W. 5076 (1984), the Supreme Court held that application of the

---

\* Indeed, the Court drew an analogy to a bar association, which uses its funds to support ideas which the majority consider worthy of support, but with which courts will not interfere merely because some members disagree with that position. 31 Cal. 2d at 150.

Minnesota Human Rights Act to require the national organization of Jaycees to admit women as voting members to local Minnesota chapters did not abridge male members' freedom of association. 52 U.S.L.W. at 5081. In reaching that result, the Court defined the two aspects of protected associational rights: intimate human relationships; and association for expressive purposes relating to activities protected by the First Amendment such as speech, assembly, petition for redress of grievances, and the exercise of religion. Outside of those two narrow categories which are entitled to broad protection, the amount of protection depends on a balance of interests to determine the nature of the right at issue. 52 U.S.L.W. at 5078.

The Court found that the degree of protection afforded "may vary depending on the extent of which one or the other aspect of the constitutionally protected liberty is at stake in a given case." *Id.* Thus, determination of the nature of the right involved is a fundamental step in determining the amount of protection afforded the right:

"Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments . . . . We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality and other characteristics that in a particular case may be pertinent." 52 U.S.L.W. at 5079 (citations omitted).

Intimate associational rights protect individuals' freedom of choice regarding matters such as family, marriage,



and schooling. The matters involved in such association frequently fall within the zone of privacy recognized to be constitutionally protected. Such association usually involves small numbers of individuals who are closely related and such association is usually based upon highly personal choices. *See Roberts*, 52 U.S.L.W. at 5078-5079.

Expressive associational rights, as defined by the Court, involve the protection of "collective effort on behalf of shared goals" as a corollary of an individual's freedom to speak, worship, and petition the government. 52 U.S.L.W. at 5079. The Court set forth three ways in which governmental action might infringe on that freedom: by withholding benefits because of membership in a disfavored group; by requiring disclosure of membership in a group; or by interfering with the internal organization of a group. It was the last of these that was involved in *Roberts*; the Court found that constitutional protection may extend to choices not to associate, where a group seeks to exclude those whose interests are inimical to the purposes for which the group was formed. 52 U.S.L.W. at 5080. Infringement of such constitutionally protected associational rights is permissible only when justified by a compelling state interest. *Id.*

The issue of infringement does not arise, however, until the determination is made that the claimed rights are in fact constitutionally protected. Appellants ignore the fact that not all interpersonal dealings warrant constitutional protection, 52 U.S.L.W. at 5079, and claim infringement of their associational rights without performing the required analysis. Application of that analysis in this case shows that the nature of the rights affected and the amount of impact on these rights do not warrant constitutional protection. Neither intimate associational rights nor expressive associational rights are affected by Califor-

nia's requirement that attorneys practicing in California belong to and pay dues to the State Bar.

Association with the State Bar has none of the characteristics marking association of an intimate nature. This Court need only consider the type of relationships afforded such constitutional protection and the values underlying such protection to find the associational aspects of membership in the State Bar does not involve such personal and emotional bonds. Like the Jaycees organization, the California State Bar is large and includes members from varied backgrounds representing a variety of interests. As in the Jaycees case, "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship." 52 U.S.L.W. at 5079. Compelling association with the State Bar does not enter into the realm of highly personal relationships. Attorneys need only become members and pay their fees. No further association or activity is required.

Similarly, the claimed right of the individual appellants not to associate with the State Bar does not implicate any of the expressive rights defined by the Court. Although appellants remain free to speak and act in support of their own beliefs, they wish to silence the group and interfere with the purpose for which it was formed, a purpose supported by a governmental interest in inclusion, not exclusion. Their claimed right not to associate finds no support in *Roberts*.

#### D. The Individual Members Of The Board Of Governors Cannot Be Held Liable

Appellants sought restitution of the sums spent for allegedly inappropriate activities from the individual members of the Board of Governors. However, appellants

have never alleged or placed on the record any evidence that those members acted in bad faith, or in any way outside of the scope of their duties as members of the Board of Governors. Under these circumstances, there is no authority for any such restitutionary order.

In fact, California state law is to the contrary. *Stanson v. Mott*, 17 Cal. 3d 206 (1976), specifically overruled an earlier decision of the California Supreme Court establishing strict liability for public officials authorizing the improper expenditure of public funds. 17 Cal. 3d at 233, overruling *Mines v. Delvalle*, 201 Cal. 273 (1972). The *Stanson* court adopted instead the requirement that public officials use

“‘due care,’ i.e., reasonable diligence, in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care.” 17 Cal. 3d at 226-27.

Various factors were set forth by the Court in determining whether a public official acted with the requisite due care. They were:

1. whether the expenditure's impropriety was obvious;
2. whether the official knew of the possible invalidity of the expenditure;
3. whether the official relied on legal advice or on the presumed validity of an existing legislative enactment or judicial decision. 17 Cal. 3d at 227.

There is no evidence on the record showing liability under these standards. Appellants submit now, however, that they should be permitted to amend their complaint (A.O.B. at 19-20). That permission was never sought below, nor was any evidence brought forward to show that

they could so amend, or that material issues of fact existed. *Estate of Supple*, 247 Cal. App. 2d 410 (1966) cited by appellants, denied the very relief appellants seek, where, as here, no allegation of bad faith was made and where, as here, no evidence was in the record to support the allegations.

Further, although the plaintiff in *Stanson v. Mott* was permitted to amend his complaint, this permission was granted because, under the existing rule prior to *Stanson*, the *Stanson* allegations had not been required. However, such is not the case here. The *Stanson* standard has been the law since 1976, and appellants were bound by it in drafting their complaint, and now.

Further, even accepting all of the allegations of the complaint as true, there are and can be no allegations which indicate that any expenditures were obviously improper, that any member of the State Bar Board of Governors knew of any potential invalidity, or that the State Bar Board of Governors did not rely on the presumption of validity given by the legislative approval of its activities. Such allegations could not be made, in light of the Legislature's actions, and the long-standing rule of law governing public agencies in California.

There is, simply, no basis for the attempt to obtain restitution from the individual members of the Board of Governors. Thus, in any event, the summary judgment in favor of the individual defendants was properly granted, dismissing them from the lawsuit with prejudice.

V. CONCLUSION

For the reasons set forth above, respondents respectfully submit that the decision of the trial court should be affirmed in all respects.

DATED: October 2, 1984

Respectfully submitted,

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE

and

HUFSTEDLER, MILLER, CARLSON &  
BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY

By

---

LAURIE D. ZELON

*Attorneys for Respondents*



## **APPENDIX D**

APPENDIX D

S.F. 25050

---

**In the Supreme Court**  
OF THE  
**State of California**

---

EDDIE KELLER, *et al.*,  
*Plaintiffs/Appellants/*  
*Cross-Appellees,*

v.

STATE BAR OF CALIFORNIA, ETC., *et al.*,  
*Defendants/Respondents/Appellees.*

---

**OPENING BRIEF ON THE MERITS  
OF DEFENDANTS/RESPONDENTS/APPELLEES**

---

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGADALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, CA 94102  
(415) 561-8200

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
JUDITH R. STARR  
700 South Flower Street  
Suite 1600  
Los Angeles, CA 90017  
(213) 629-4200  
*Attorneys for Defendants/  
Respondents/Appellees*

## TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION.....	1
II. THE STATE BAR IS A GOVERNMENTAL ENTITY.....	4
A. The State Bar Has Been Consistently Treated As Government.....	5
B. The Court of Appeal Erred In Holding The State Bar Is Not Government .....	9
1. Government May Exercise Discretionary Powers.....	9
2. Government May Be Funded By A Limited Group .....	10
3. Membership Is Not An Issue .....	11
4. The State Bar Must Be Treated As A Single Entity.....	11
III. CALIFORNIA LAW SETS GUIDELINES FOR GOVERNMENT SPEECH THAT PROTECT FIRST AMENDMENT RIGHTS	12
A. <i>Stanson</i> Strikes The Balance.....	13
B. <i>Miller</i> Provides Additional Guidelines ..	16
C. <i>Miller</i> and <i>Stanson</i> Apply To This Case	18
IV. CALIFORNIA LAW COMPLIES WITH FEDERAL CONSTITUTIONAL RE- QUIREMENTS.....	20
A. Federal Law Permits Government Speech.....	20
B. Required Association With The State Bar Does Not Violate Plaintiffs' Free- dom of Association .....	21
C. Speech Activity By The State Bar Does Not Implicate The Individual .....	22



## TABLE OF CONTENTS

	<u>Page(s)</u>
V. THE STANDARDS GOVERNING PRIVATE LABOR ORGANIZATIONS SHOULD NOT BE APPLIED TO THE STATE BAR .....	25
A. The Labor Union Cases Are Not Applicable .....	25
B. The Court of Appeal Improperly Adopted "Political and Ideological" As A Standard for Evaluating Speech Of The State Bar .....	27
C. Decisions In Other Jurisdictions Dealing With Unified Bars Do Not Deal With The Issue Central To This Case ...	29
D. The Court Incorrectly Interpreted The <i>Abood</i> Standards .....	31
E. The Court of Appeal's Unwarranted Expansion Of The <i>Abood</i> Test Conflicts With First Amendment Rights .....	32
1. <i>Abood</i> Protects Free Speech .....	33
2. The Expanded Court of Appeal Test Prevents Speech .....	34
3. Unrestrained Personal Liability Will Inhibit Protected Speech .....	36
4. The Court of Appeal's Test Is Based On Prohibited Content — Based Discrimination .....	37
VI. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE INDIVIDUAL DEFENDANTS .....	38

## TABLE OF CONTENTS

	<u>Page(s)</u>
A. The Judgment In Favor Of The Individual Defendants Was Required By Law ..	38
B. The Court of Appeal Decision Improperly Requires the State Bar To Justify Each Of Its Activities In Response To A Categorical Challenge ..	40
C. The Undisputed Facts Establish Defendants' Right To Prevail As A Matter Of Law .....	41
VII. CONCLUSION .....	44

## TABLE OF AUTHORITIES

## Cases

	<u>Page(s)</u>
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977) .....	D-30, 31, 33, 34, 36, 38, 43
<i>Anderson v. Liberty Lobby, Inc.</i> , 54 U.S.L.W. 4755 (June 25, 1986) .....	D-41
<i>Angelus Chevrolet v. State</i> , 115 Cal. App. 3d 995, 171 Cal. Rptr. 801 (1981) .....	D-41
<i>Arrow v. Dow</i> , 544 F. Supp. 458 (D.N.M. 1982) ...	D-30
<i>Baggett v. Bullitt</i> , 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316 (1964) .....	D-33
<i>Bettencourt v. Industrial Accident Comm.</i> , 175 Cal. 559, 166 P. 323 (1917) .....	D-5
<i>Brady v. State Bar of California</i> , 533 F.2d 502 (9th Cir. 1976) .....	D-7
<i>Chicago Teachers Union, etc. v. Hudson</i> , ____ U.S. ____, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986) ..	D-31
<i>Chronicle Publishing Co. v. Superior Court</i> , 54 Cal. 2d 548, 7 Cal. Rptr. 109, 354 P. 2d 637 (1960) ..	D-6
<i>Common Cause v. Bolger</i> , 574 F. Supp. 672 (1982), <i>aff'd</i> . 461 U.S. 911, 77 L. Ed. 2d 280, 103 S. Ct. 1888 (1983) .....	D-21
<i>Crawford v. Imperial Irrigation Dist.</i> , 200 Cal. 318, 253 P. 726 (1927) .....	D-15
<i>Daugherty v. Riley</i> , 1 Cal. 2d. 298, 34 P. 2d 1005 (1934) .....	D-10
<i>Ellis v. Brotherhood of Railway, Airline &amp; Steam- ship Clerks</i> , 466 U.S. 435, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984) .....	D-31, 33, 34

## TABLE OF AUTHORITIES

## CASES

	<u>Page(s)</u>
<i>Engel v. McCloskey</i> , 92 Cal. App. 3d 870, 155 Cal. Rptr. 284 (1979) .....	D-12
<i>Environmental Planning and Information Council, etc. v. Superior Court</i> , 36 Cal. 3d 188, 203 Cal. Rptr. 127, 680 P. 2d 1086 (1984) .....	D-42
<i>Erzinger v. Regents of the Univ. of Calif.</i> , 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982), <i>cert. den.</i> 462 U.S. 1133, 77 L. Ed. 2d 1368, 103 S. Ct. 3114 (1983) .....	D-10, 18, 19
<i>Falk v. State Bar</i> , 411 Mich. 63, 305 N.W. 2d 201 (1981) .....	D-29
<i>FCC v. League of Women Voters of California</i> , 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984) .....	D-20, 21, 23, 25
<i>First Nat'l. Bank of Boston v. Bellotti</i> , 435 U.S. 765, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978) .....	D-31, 32, 36, 37
<i>Gibson v. the Florida Bar</i> , ____ F. 2d ____ (11th Cir., September 15, 1986) .....	D-30
<i>Good Government Group of Seal Beach, Inc. v. Superior Court</i> , 22 Cal. 3d 672, 150 Cal. Rptr. 258 (1978), <i>cert. den.</i> 441 U.S. 961, 60 L. Ed. 2d 1066, 99 S. Ct. 2406 (1979) .....	D-42
<i>Gooding v. Wilson</i> , 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972) .....	D-35
<i>Hanna v. Plumer</i> , 380 U.S. 460, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965) .....	D-37

## TABLE OF AUTHORITIES

## CASES

	<u>Page(s)</u>
<i>Herron v. State Bar of California</i> , 212 Cal. 196, 298 P. 474 (1931) .....	D-8
<i>Hishon v. King &amp; Spalding, Inc.</i> , 467 U.S. 69, 81 L. Ed. 59, 104 S. Ct. 2229 (1984) .....	D-24
<i>Kolender v. Lawson</i> , 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) .....	D-34, 35
<i>Lathrop v. Donohue</i> , 367 U.S. 820, 6 L. Ed. 2d 1191, 81 S. Ct. 1826 (1961) .....	D-8, 21, 22, 30
<i>Lehane v. City and County of San Francisco</i> , 30 Cal. App. 3d 1051, 106 Cal. Rptr. 918 (1972), app. dismissed 410 U.S. 982, 35 L. Ed. 2d 698, 93 S. Ct. 144 .....	D-15; 17
<i>Metromedia, Inc. v. San Diego</i> , 453 U.S. 490, 69 L. Ed. 2d 8, 85 S. Ct. 1136 (1965) .....	D-37, 38
<i>Miller v. California Commission on Status of Women</i> , 151 Cal. App. 3d 693, 198 Cal. Rptr. 877, app. dismissed — U.S. —, 83 L. Ed. 2d 15, 105 S. Ct. 64 (1984) .....	D-9, 10, 12, 16, 17, 18, 19, 20, 25
<i>Muskopf v. Corning Hospital Dist.</i> , 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961) .....	D-10
<i>NAACP v. Button</i> , 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963) .....	D-36
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734, 10 L. Ed. 2d 670, 83 S. Ct. 1453 (1963) .....	D-26
<i>New York Times v. Sullivan</i> , 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) .....	D-33
<i>Pacific Gas &amp; Electric Co. v. Public Utilities Comm. of Calif.</i> , — U.S. —, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986) .....	D-21, 24, 25, 34

## TABLE OF AUTHORITIES

## CASES

	<u>Page(s)</u>
<i>In Re Peterson</i> , 208 Cal. 42 (1929) .....	D-7
<i>Police Dept. of Chicago v. Mosley</i> , 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) .....	D-33
<i>Railway Employees Dept. v. Hanson</i> , 351 U.S. 225, 100 L. Ed. 112; 76 S. Ct. 714 (1961) .....	D-21, 22
<i>Regan v. Taxation With Representation of Washington</i> , 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) .....	D-20, 21; 35
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) .....	D-23
<i>Rhyne v. Municipal Court</i> , 113 Cal. App. 3d 807, 170 Cal. Rptr. 312 (1980) .....	D-5
<i>Savelli v. Board of Medical Examiners</i> , 229 Cal. App. 2d 124, 40 Cal. Rptr. 171 (1983), cert. den. 380 U.S. 934, 13 L. Ed. 2d 821, 85 S. Ct. 940 (1984) .....	D-10
<i>Schneider v. Colegio de Abogados de Puerto Rico</i> , 565 F. Supp. 963 (1983), rev'd and remanded, sub. nom. <i>Romany v. Colegio de Abogados de Puerto Rico</i> , 742 F. 2d 32 (1st Cir. 1984) .....	D-30
<i>Scott v. Dixon</i> , 720 F. 2d 1542 (11th Cir. 1983), cert. den. — U.S. —, 83 L. Ed. 2d 64, 105 S. Ct. 122 (1984) .....	D-39
<i>Service Employees' Int'l. Union v. Roseville Comm. Hospital</i> , 24 Cal. App. 3d 400, 101 Cal. Rptr. 69 (1972) .....	D-5



## TABLE OF AUTHORITIES

## CASES

	<u>Page(s)</u>
<i>Sipple v. Chronicle Pub. Co.</i> , 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984) .....	D-42
<i>Stanson v. Mott</i> , 17 Cal. 3d 206, 130 Cal. Rptr. 697, 551 P. 2d 1 (1976) .....	<i>Passim</i>
<i>State Bar of Calif. v. Superior Court</i> , 207 Cal. 323, 278 P. 432 (1929) .....	D-8
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) .....	D-33
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) .....	D-23, 24
<i>Wooley v. Maynard</i> , 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) .....	D-23, 24
<i>Young Americans for Freedom v. Gorton</i> , 91 Wash. 2d 204, 588 P. 2d 195 (Wash. 1978) .....	D-15

## Constitution

California Constitution, Article VI, § 9 .....	D-5, 10
--	---------

## Statutes

<i>United States Code</i>	
42 USC § 1983 .....	D-39
<i>Business &amp; Professions Code</i>	
§ 6000, <i>et seq.</i> (State Bar Act) .....	D-5
§ 6001(g) .....	D-14
§ 6002 .....	D-6

## TABLE OF AUTHORITIES

## STATUTES

	<u>Page(s)</u>
§ 6008 .....	D-6
§ 6008.2 .....	D-6
§ 6012 .....	D-6, 17
§ 6013 .....	D-6, 17
§ 6013.5 .....	D-6, 17
§ 6025 .....	D-14
§ 6026.5 .....	D-6, 17
§ 6028(a) .....	D-14
§ 6029 .....	D-14
§ 6031(a) .....	D-7, 14, 15
§ 6031(b) .....	D-8
§ 6046 .....	D-7
§ 6060 .....	D-7
§ 6076.5 .....	D-7, 10
§ 6077 .....	D-7
<i>Code of Civil Procedure</i>	
§ 437c .....	D-41
<i>Evidence Code</i>	
§ 200 .....	D-5
<i>Fish &amp; Game Code</i>	
§ 700, <i>et seq.</i> .....	D-10
<i>Government Code</i>	
§ 811.2 .....	D-5

## TABLE OF AUTHORITIES

## STATUTES

	<u>Page(s)</u>
§ 8246 .....	D-10
§ 53050 .....	D-6
§ 87000 <i>et seq.</i> .....	D-6

*Public Resource Code*

§ 3400 .....	D-10
West Annot. Code, <i>Rules</i> Pt. 2, p. 243 (1986 Supp.) .....	D-6

## Treatises

H. Hart and A. Sacks, <i>The Legal Process</i> , 1-9 (tent. ed. 1958) .....	D-35
K. Davis, <i>Administrative Law Treatise</i> § 3.9 (2d Ed. 1978) .....	D-10
L. Tribe, <i>American Constitutional Law</i> , § 12-26 (1978) .....	D-17, 35
M. Yudof, <i>When Government Speaks</i> xvi (1983) .....	D-14, 35
Weil & Brown, <i>Civil Procedure Before Trial</i> § 10:10 (1984) .....	D-41

This brief is submitted on behalf of the State Bar of California and the individual appellees below who are former members of the State Bar's Board of Governors.<sup>1</sup> These parties seek affirmance of the summary judgment entered by the trial court preserving the ability of the State Bar to fulfill its legislatively and constitutionally mandated role in California government.

## I. INTRODUCTION

Plaintiffs challenge the propriety of certain fundamental categories of State Bar activities. They claim the activities violate their first amendment rights because they oppose the activities, because they consider the activities "ideological and political" and because the activities are funded by fees the Legislature requires all attorneys practicing in the State to pay annually.

The case presented by plaintiffs' pleadings was not the case decided by the Court of Appeal; while plaintiffs seek to enjoin Bar activity within broad areas outside of regulation of attorney admission and discipline, the Court of Appeal treated their claims as if they were limited objections to the use of mandatory fees for specific activities within the broad categories with which Plaintiffs disagree. From this mistaken view of the case, other errors, including the ruling that the record was inadequate to support the summary judgment, flowed.

Plaintiffs' challenge, however, is overbroad and categorical; they seek to enjoin all lobbying, all speeches by State Bar presidents, all filing of amicus briefs and all activity of the Conference of Delegates. The only specific activity challenged by Plaintiffs was the State Bar's

<sup>1</sup>Defendant Phyllis M. Hix does not join in this brief, and was not a party to the proceeding in the Court of Appeal.

publication and dissemination of materials from its Independence of the Judiciary program. Plaintiffs also seek to hold individuals who served as members of the State Bar's Board of Governors personally liable for expenditures made to support the challenged activities.

The right asserted by Plaintiffs is a negative right — a right not to be associated with the State Bar or to finance indirectly speech with which they may disagree. Plaintiffs claim this right will be protected only if the State Bar is prohibited from engaging in activities that may be classified as "political and ideological." Plaintiffs assert that the State Bar is analogous to a labor union, and that federal labor union cases permit the relief they seek. Plaintiffs' claims, however, far exceed the rights recognized in the labor union cases. In fact, Plaintiffs seek greater restrictions on the State Bar's activity than those imposed on labor unions by arguing that the State Bar is unable to act at all if a category of activity falls within the all pervasive label of "political and ideological," even though the activity is germane to the State Bar's purpose. Labor unions are merely required to rebate compelled dues, rather than use them for purposes not germane to collective bargaining; they are not required to cease their activity.

Plaintiffs' claim also fails because the State Bar is a part of California government and is not analogous to a labor union. The activities of the State Bar (and its governing board) must be evaluated by the teachings of the United States Supreme Court and this Court dealing with compelled exactions that finance government speech if the proper balance is to be struck between individual rights and the rights and needs of the public for effective government. This Court's decision in *Stanson v. Mott*, 17 Cal. 3d 206 (1976) balances these interests and provides

both the scope necessary for government to govern and the predictability necessary to permit individuals serving as public officials to undertake their duties without being paralyzed by fear of liability.

*Stanson* held that a governmental entity can use public funds to advocate positions on matters within its statutory authorization, so long as the "style, tenor and timing" of the government speech does not taint the electoral process. Government may engage in advocacy through activities other than partisan electoral campaigning, including lobbying, so long as explicitly or implicitly authorized by statute. *Stanson* also protects the individuals who constitute government from the paralyzing effects of the broad reaching liability imposed by the Court of Appeal. Thus, this Court should affirm the application of *Stanson* to the activities of the State Bar, and to all authorized governmental activity, to ensure that government is not limited to actions and speech only on topics engendering no controversy. Only in this way can governmental action be fully informed action.

At core, this case concerns what standards control government speech and when they apply. The key issue is whether the State can, through constitutional and statutory provisions, create a governmental entity and empower it to address issues with social and political content when those activities are funded by a specific regulated group, itself intimately related to a governmental function, rather than by the public at large. The State Bar submits that while the attorneys of this State alone finance the activities of the State Bar, it is entirely proper for the State to create, empower and fund the State Bar as it has. The State Bar is a governmental entity, and Plaintiffs are, like all other taxpayers, compelled by the state to finance activities of government.



The Court of Appeal erred in treating the State Bar as a labor union and in so doing committed additional error by adopting the phrase "political and ideological" as a standard in its decision. The phrase has meaning in the labor context when a union is charged with improperly using dues compelled from union shop members or agency shop nonmembers for purposes not germane to collective bargaining. The phrase was adopted in that context by the United States Supreme Court to define one area of union activity unrelated to preservation of labor peace, which was the purpose that the Court found justified compelled association with a union. The use of the phrase is grossly misplaced (and susceptible to far broader meaning) as a test of the propriety of a governmental action. To preclude state government and its individual subparts from engaging in all activity with a "political and ideological" content would prevent government from governing, and would require it to shape its conduct to an unwieldy and inappropriately vague standard.

By failing to recognize the nature of the State Bar, by failing to analyze properly the teachings of the United States Supreme Court and this Court and by ignoring the need for clear workable standards to guide governmental entities, the Court of Appeal has built an impossibly convoluted and unworkable structure upon a foundation of sand. In no way can this structure survive the inexorable waves of logic and common sense.

## II. THE STATE BAR IS A GOVERNMENTAL ENTITY

The Court of Appeal avoided application of *Stanson v. Mott* to this case by finding that "the State Bar is a unique organization which partakes of some governmental attributes and some non-governmental characteristics," and

which is not treated as government when a court deems its activities to be non-governmental (*See Op.* at 31-32). This characterization rests on a fundamental misconception of the role of the State Bar in the legal system of California, and blurs the definitive line that has previously permitted the State Bar to regulate its own activities within the confines of statute and legislative oversight.

### A. The State Bar Has Been Consistently Treated As Government

The State Bar is a governmental entity created and maintained to serve the public interest in the effective functioning of the legal system. Unlike any private association, it is created by the state constitutional and statutory provisions, and is subject to the direct control of the Legislature by specific statutes and budgetary approval, and of the Supreme Court by enactment of special rules.

The State Bar was created as a public entity in 1927 and established by the voters as a constitutional entity in both 1960 and 1966. *See* Article VI § 9, California Constitution (establishing the State Bar of California as a public corporation). The parallel legislative enactment, establishing the State Bar as a public corporation,<sup>2</sup> and enumerating its powers, is the State Bar Act, Bus. & Prof. Code, §§ 6000, *et seq.*

All persons admitted and licensed to practice law in this state except justices and judges of courts of record

<sup>2</sup>Public corporations are public entities. *See Service Employees' Int'l Union v. Roseville Community Hospital*, 24 Cal. App. 3d 400, 407 (1972); *Bettencourt v. Industrial Acc. Co.*, 175 Cal. 559, 561 (1917). *See also* Gov't Code §§ 811.2, 53050; Evid. Code § 200; *Rhyne v. Municipal Court*, 113 Cal. App. 3d 807, 824-25 (1980).

during their service in office are members of the State Bar. Bus. & Prof. Code § 6002. The State Bar is governed by a twenty-three person Board of Governors, consisting of a president elected by and from members of the Board, fifteen members elected from nine geographical districts, one member elected by the California Young Lawyers Association and six members of the public appointed on a rotating basis by the governor and officials of the Legislature. Bus. & Prof. Code §§ 6012, 6013, 6013.5. Members of the Board of Governors are public officers, acting under oath. *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 566, 7 Cal. Rptr. 109, 354 P. 2d 637 (1960). Members of the Board and State Bar employees are also subject to state law relating to disclosure of financial interests and conflicts of interest. See Gov't Code §§ 87000 *et. seq.*

The State Bar funds its activities primarily through fees from its membership. Those fees must be authorized through a bill passed by the Legislature, based on a report submitted by the State Bar of all its projected activities and anticipated funding needs. See Decl. of M. Wailes and Ex. 1 thereto (O.F. at 260).

All property of the State Bar is held for "essential public and governmental purposes in the judicial branch of government" and is tax-exempt. Bus. & Prof. Code §§ 6008, 6008.2. Except for certain confidential proceedings, all meetings of the Board of Governors must be open to the public. Bus. & Prof. Code § 6026.5.<sup>3</sup> See also West Annot. Code, *Rules*, Pt. 2 (1986 Supp.) at 243.

<sup>3</sup>The State Bar has been specifically exempted from the State Administrative Procedure Act, a fact indicating legislative recognition that the State Bar is "at least akin to a state public body or agency...." *Chronicle Publishing Co. v. Superior Court*, 54 Cal.2d 548, 565 (1964).

The State Bar's duties are of a regulatory, adjudicative and informational nature. The State Bar regulates the admission to the practice of law. Bus. & Prof. Code §§ 6046, 6060. Subject to Supreme Court oversight, it has the power to formulate rules of professional conduct, Bus. & Prof. Code § 6076.5, and to discipline members who breach the rules, Bus. & Prof. Code § 6077. In adjudicating disciplinary violations, the State Bar is subject to due process requirements of notice and hearing. *In re Peterson*, 208 Cal. 42 (1929).

The State Bar is also empowered to carry on activities to improve the administration of justice and to advance the science of jurisprudence. Bus. & Prof. Code § 6031(a). The State Bar has exercised this power by using the special expertise of attorneys of the state to inform other governmental agencies and the public on law-related issues through activities such as lobbying and filing amicus briefs. Numerous other specific projects have been created under this authority. See, e.g., *Brady v. State Bar of California*, 533 F.2d 502, 503 (9th Cir. 1976) (upholding creation of California Pilot Program in Legal Specialization under § 6031(a)).

The record presented below demonstrates that the categories of activities challenged by Plaintiffs have been part of State Bar programs for many years. For example, for years the Bar has organized sections of members to propose legal reform in various areas, including judicial selection and conduct. Even in the Bar's earlier days, members of the Board of Governors and Secretary of the Bar lobbied for adoption of legislation recommended by Bar sections. (O.F. 293-98.) These and other activities of the Bar were matters of common knowledge in 1966 when the most recent provision of the California Constitution authorizing the State Bar was enacted. They have also



been subject to scrutiny by the Legislature each year that it has enacted a statute authorizing State Bar funding.

The importance of these activities to the public has been recognized by numerous decisions of this State and by the United States Supreme Court. *See Lathrop v. Donohue*, 367 U.S. 820, 6 L. Ed. 2d 1191, 81 S. Ct. 1826 (1961); *Herron v. The State Bar*, 212 Cal. 196, 199 (1931). *See also State Bar of California v. Superior Court*, 207 Cal. 323 (1929) (upholding the constitutionality of the State Bar Act and the establishment of the State Bar as a public corporation):

"This body of our citizenry known to the laws of this state as 'attorneys and counselors at law' form a integral and indispensable unit in our system of administering justice . . . Thus it is that the profession and practice of the law, while in a limited sense a matter of private choice and concern in so far as it relates to emoluments, is essentially and more largely a matter of public interest and concern . . . ." *Id.* at 330.

Moreover, not only does the Legislature control the State Bar's ability to fund itself, but it also contracts and expands the Bar's statutory powers. *See e.g.*, Bus. & Prof. Code § 6031(b) (1984) (prohibiting the State Bar from conducting any evaluations of the credentials of a specific justice without prior review and statutory authorization by the Legislature). Thus the State Bar, like all governmental entities, is subject to the legislative and judicial oversight that serves as a safeguard against overreaching.

## B. The Court Of Appeal Erred In Holding The State Bar Is Not Government

Despite the fact that the State Bar possesses attributes of a governmental entity and has been expressly held by this Court to be so, the Court of Appeal found the State Bar sometimes is government, and sometimes is not. Specifically, the Court of Appeal held that when the State Bar regulates the admission and practice of attorneys it is government, but when it acts to further the administration of justice (through lobbying, filing amicus briefs, etc.), it is a private entity, akin to a labor union. (Op. at 25.)

Accordingly, the Court of Appeal held that the standard for evaluating government speech set forth in *Stanson v. Mott*, 17 Cal. 3d 206 (1976) does not apply to this case. The Court based its evaluation of the State Bar (and its rejection of the applicability of *Stanson* and a later case, *Miller v. Commission on the Status of Women*, 151 Cal. App. 3d 693 (1984)) on the following: 1) the statutory language authorizing State Bar activities to advance the science of jurisprudence and to further the administration of justice is discretionary; 2) the State Bar is funded by fees paid by attorneys rather than by a statewide fund; and 3) the State Bar speaks on behalf of its members when engaged in activities such as lobbying. (Op. at 34-37.) The last of these findings is unsupported by the record; attributing significance to each of these findings misconstrues applicable law.

### 1. Government May Exercise Discretionary Powers

No case law supports the Courts' proposition that a governmental entity exercising discretionary powers is any less a part of government than an entity exercising mandatory powers. To the contrary, exercise of discretion



delegated by the legislature is the essence of governmental action, and courts allow governmental entities wide latitude and deference in carrying out legislative policy. *See Savelli v. Board of Medical Examiners*, 229 Cal. App. 2d 124, *cert. denied*, 380 U.S. 934, 13 L. Ed. 2d 821, 85 S. Ct. 940 (1964); K. Davis, *Administrative Law Treatise* § 3.9 (2d ed. 1978). In fact, some of the State Bar's regulatory powers, which the Court of Appeal conceded to be governmental, are authorized in discretionary language. *See, e.g.*, Bus. & Prof. Code § 6076.5 (State Bar may formulate rules of professional conduct). *See also Miller v. Commission on the Status of Women*, 151 Cal. App. 3d 693, *appeal dismissed*, U.S. , 83 L. Ed. 2d 15, 105 S. Ct. 64 (1984) (*Stanson* applied to governmental entity authorized, but not mandated, by Gov't. Code § 8246 to lobby and to inform the Legislature of its position).

## 2. Government May Be Funded By A Limited Group

The funding base of a public entity also is not controlling on the issue of whether it is part of government. Many governmental entities obtain significant parts of their funding from specific sources, such as assessments on those they regulate, rather than from general funds. *See, e.g.*, Pub. Res. Code § 3400 (Dept. of Conservations' supervision and protection of oil and gas deposits funded by assessments on oil and gas properties and charges on operators and royalty holders); Fish & G. Code § 700 *et seq.*, (Dept. of Fish & Game to receive permit and license fees for its administration); *Daugherty v. Riley*, 1 Cal. 2d 298, 308 (1934) (fees collected by Department of Corporations are solely for use of that department). *See also Erzinger v. Regents of the University of California*, 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982) *cert. denied* 462 U.S. 1133 (1983) (indirect funding of abortion services

by identifiable and specific group, *i.e.*, students of University of California, did not violate first amendment).

## 3. Membership Is Not An Issue

The State Bar submits that the Court ignored the record in finding that the State Bar purports to speak on behalf of its members. In support of its motion for summary judgment, the State Bar submitted uncontradicted declarations of its lobbyists stating that the State Bar speaks for itself, not its members, when lobbying the Legislature. (O.F. at 1140, 1142.) The only evidence submitted by Plaintiffs on this issue was a one-page lobbying registration sheet in which the State Bar responded to a request for identification of others with a "common economic interest which is principle [sic] represented or from which membership or financial support is principally derived." (O.F. at 204.) The response of the State Bar, claimed by Plaintiffs to show the State Bar speaks on behalf of its members, was a quote from Article VI, § 9 of the State Constitution stating that attorneys shall be members of the State Bar.<sup>4</sup>

## 4. The State Bar Must Be Treated As A Single Entity

The Court of Appeal's holding that the State Bar is at one time both government and a private entity reflects an outmoded distinction rejected by the California Supreme Court as an "anachronism" and "without rational basis." *See Muskopf v. Corning Hosp. Dist.*, 55 Cal. 3d 211, 214 (1961) (tort liability of state agencies determined with-

<sup>4</sup> Plaintiffs concede that their claim does not concern or turn on use of the term "members." *See* "Answer to Petition For Rehearing" at 2-3.

out consideration of whether activity is governmental or proprietary).

The State Bar urges that the schizophrenic approach taken in the Court below be rejected, as it is contrary to settled authority on the operations of numerous governmental entities.<sup>5</sup> Instead, Plaintiffs' claims should be analyzed under the principles of *Stanson v. Mott*, as the State Bar is a governmental agency whose activities, whether discretionary or not, are authorized by state statute. Plaintiffs' expectations and interests in not supporting a governmental agency are different, and must be treated differently, than individuals' interests in not being compelled to support private non-governmental entities. *Stanson* provides the appropriate protection of first amendment rights and balancing of the competing interests at stake here.

### III. CALIFORNIA LAW SETS GUIDELINES FOR GOVERNMENT SPEECH THAT PROTECT FIRST AMENDMENT RIGHTS

The balance struck by the California courts in regulating governmental entities recognizes that government must speak to govern effectively, and encourages the government to add its voice to the marketplace of ideas: "If the government cannot address controversial topics, it cannot govern." *Miller, supra*, 151 Cal. App. 3d at 701; *Stanson, supra*. Speech by the government does not inhibit the ability of individuals to express themselves when conducted, as here, within the restrictions established by those cases. Federal constitutional requirements are no different. See Section IV, *infra*.

<sup>5</sup> As for the State Bar itself, it has been treated as a governmental entity under the state tort claims act, *Engel v. McCloskey*, 92 Cal. App. 3d 870 (1970) and by the NLRB and IRS.

#### A. *Stanson* Strikes The Balance

In *Stanson v. Mott, supra*, this Court held that a statute authorizing the Department of Parks and Recreation to disseminate information relating to its activities allowed the Department to expend public funds to provide a "fair presentation" of relevant information about a proposed bond act. In drawing the line separating unauthorized and therefore prohibited promotional activity from proper informational activity, this Court clearly permitted the full presentation of relevant facts to the public, including an agency's view of a ballot proposal. 17 Cal.3d at 221.

The balance struck is designed to maintain governmental impartiality in electoral matters to avoid adulteration of the voters' free and pure choice, while preserving the government's ability to inform, educate and persuade. Thus, public agency lobbying is permitted because it does not distort the legislative process; that process contemplates that interested parties will interact with the legislature to ensure it considers their views.<sup>6</sup> See 17 Cal. 3d at 218. Moreover, government must be allowed latitude to accomplish its purposes.

"More fundamentally, while public agency 'lobbying' efforts undeniably involve the use of public funds to promote causes which some members of the public may not support, one of the primary functions of elected and appointed executive officials is, of course, to devise legislative proposals to attempt to implement the current administration's policies." *Id.*

While government may not engage in speech to manipulate democratic choices, it may inform the public so that

<sup>6</sup> This rationale is equally applicable to the judicial process: the submission by a public agency of an amicus brief to a court in no way distorts judicial decisionmaking.



democratic choices are informed choices. Government advances public policy and expands private choices through communication. *See* M. Yudof, *When Government Speaks* xvi (1983). Where government speech is not addressed to the electorate, as in lobbying or filing amicus briefs, danger to democratic processes is nonexistent, and government speech of this type is subject only to those limitations imposed by the legislature. *See* 17 Cal. 3d at 221, n. 6. Even where government speech may present some danger of interference with democratic electoral processes, it is permitted subject only to a court's evaluation of the property of its "style, tenor and timing," 17 Cal. 3d at 222.

The State Bar Recognizes that its status as a governmental entity is not a license to use the compelled fees of the State's practicing attorneys for any purpose. Rather the State Bar has acted within the scope of its statutory authority,<sup>7</sup> both implicit and explicit, when attempting to

<sup>7</sup>The legislative authorization for the California State Bar is clear and broad. Among other things, the State Bar is empowered to "Do all . . . acts . . . necessary or expedient for the administration of its affairs or the attainment of its purposes." Bus. & Prof. Code § 6001(g). The Board of Governors of the State Bar is authorized to "make appropriations and disbursements from the funds of the State Bar to pay all necessary expenses for effectuating the purposes of this chapter" Bus. & Prof. Code § 6028(a). *See also* Bus. & Prof. Code § 6025 (the Board may "formulate rules and regulations" to carry out State Bar purposes) and Bus. & Prof. Code § 6029 (the Board may appoint "committees, officers and employees as it deems necessary or proper" and pay salaries and necessary expenses.") Finally,

"The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the

inform its members, the public, the legislature and the judiciary on important issues concerning the state legal system.

Accordingly, three of the State Bar activities challenged by Plaintiffs can be disposed of summarily under the *Stanson* analysis. First, Bus. & Prof. Code § 6031(a) authorizes the State Bar to lobby the legislature; under *Stanson* no other ground exists to challenge this activity. *See also* *Lehane v. City and County of San Francisco*, 30 Cal. App. 3d 1051 (1972); *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318 (1927).

Second, the filing of amicus briefs by the State Bar is also authorized by § 6031(a) as it is directly related to the improvement of the administration of justice; no rational basis supports imposition of any further limits on this activity. (*Cf. Young Americans for Freedom v. Gorton*, 91 Wash. 2d 204, 588 P. 2d 195 (1978)) (upholding power of state attorney general to file amicus brief in *Bakke* case before U.S. Supreme Court; government has a legitimate interest in informing a court of the state's interest in admissions policies that further goal of integration).

Third, the State Bar's funding of the Conference of Delegates is authorized by § 6031(a) as activity to advance the science of the jurisprudence and administration of justice. The Conference of Delegates is a forum for

---

relations of the bar with the public." Bus. & Prof. Code § 6031(a).

Plaintiffs could not and did not show that any of the activities they challenge are outside the scope of the State Bar's authorization; the record below, setting forth the nature and scope of its activities, demonstrates that the activities are authorized. *See* Minute Order, Superior Court, March 19, 1984, (specifically finding that all of the challenged activities are statutorily authorized) (O.F. at 1752-54.)



expression of divergent viewpoints, permitting further dissemination of ideas.

Fourth, all State Bar activities are regularly authorized by the Legislature when it approves State Bar fees.

#### B. *Miller* Provides Additional Guidelines

In applying the *Stanson* criteria to the other activities of the State Bar under challenge here — dissemination of a former bar president's swearing-in speech and a public education program on the judiciary — the decision in *Miller v. California Commission on the Status of Women*, 15 Cal. App. 3d 693 (1984) is determinative. *Miller* involved a taxpayer challenge to the existence of the Commission on the Status of Women. The plaintiff requested, as have Plaintiffs in this case, that the court prohibit any advocacy by Commission officials of their views on the economic and social status of women. 151 Cal. App. 3d at 699. In completely rejecting Plaintiff's challenge to Commission speech on the basis of its ideological or political content, the court pointed out that limits on government speech do not presuppose "that government cannot add its own voice to the many it must tolerate, provided that it does not drown out private communication." 151 Cal. App. 3d at 700.

*Miller* recognized the distinction between adding government's voice and silencing the individual. Pointing to government's need to address controversial topics to govern effectively, the court noted that the open meeting provision of the Commission's authorizing statute, similar to that opening meetings of the State Bar's Board of Governors, enabled plaintiff to air her views before the Commission. 151 Cal. App. 3d at 701. Plaintiff's financial support of the Commission's speech did not rise to a compelled affirmation of its views, as she could openly

disagree at Commission meetings or resort to the electoral process to change its orientation. 151 Cal. App. 3d at 702.

*Miller* establishes in California law the principle recognized by federal law that government need not be neutral; dissenters have no right to silence governmental affirmations of the values it was elected to promote. See L. Tribe, *American Constitutional Law* § 12-5 at 590 (1978). Thus, Plaintiffs' challenge to former State Bar president Murray's speech and the State Bar's Public Education Project on the Judiciary on the ground that they disagree with the ideological and political viewpoint expressed is without merit.

The State Bar provides Plaintiffs with a forum in which they can express their disagreement. Through participation in its own electoral process, as well as through the state electoral process, Plaintiffs can attempt to change the State Bar's viewpoint. See Bus. & Prof. Code §§ 6026.5, 6012, 6013 and 6013.5. This is well recognized protection:

"If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of a government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in others, his recourse is to vote against them." *Lehane, supra*, 30 Cal. App. 3d at 1056.

The Court of Appeal failed to consider that Plaintiffs are free to speak on any of the issues covered by the State Bar's activities. In fact, one of the challenged activities, the Conference of Delegates, is a forum for attorneys'

viewpoints. Thus, Plaintiffs have not been silenced; they stand in the same position as other taxpayers who disagree with positions taken by governmental entities and officials, and can attempt to influence such positions by their vote and voice.

### C. *Miller* and *Stanson* Apply to This Case

The Court of Appeal attempted to distinguish the State Bar from the Commission on two grounds. First, it found the Commission was established by government and authorized to speak on its behalf, with "no one . . . forced to add his or her assent to the government's voice." Second, it noted that the Commission was funded from general funds.

Neither purported distinction is a basis for halting the activities of the State Bar. As set forth above, Plaintiffs are in no way forced to affirm the government's speech nor is there any factual support for the Court's finding that the State Bar speaks on behalf of its members.

The distinction based on financing also fails. While the agency in *Miller* was funded by general revenues rather than levies on a specific group, other authority permits the funding of government actions by specific, identifiable groups. In *Erzinger v. Regents of The University of California*, 137 Cal. App. 3d 389 (1982), students of the University of California sought a declaration that the University violated their freedom of religion, guaranteed by the first amendment, by cancelling their enrollment because they refused to pay portions of enrollment fees allocated to providing abortion services. In affirming a judgment in favor of the University, the Court of Appeal held that the University had not coerced the students' religious beliefs or violated their rights to practice religion.

Thus, individuals clearly identifiable as students of the University of California were compelled to support indirectly activities they opposed on first amendment grounds in order to pursue a basic right — education. The funding base for the activities was specific and identified with the objecting students, yet the Court found no first amendment violation. The Court in *Erzinger* correctly recognized that financial support, from a specifically identifiable group to a governmental entity, is not an affirmation of belief sufficient to permit the group either to prohibit the entity's action or to refuse to fund it.

The Court of Appeal accordingly erred in refusing to apply *Stanson*, *Miller* and *Erzinger* to the State Bar's programs. The trial court properly applied the standards of these cases to the State Bar's dissemination of former president Murray's swearing-in speech on the judiciary and the Public Education Program on the Judiciary, implicitly finding on the undisputed facts in the record that the Public Education Program constituted a full presentation of relevant facts and that dissemination of former president Murray's swearing-in speech constituted a permissible presentation of the State Bar's leadership's view on judicial retention criteria to interested parties. Dissemination of the viewpoint of the leadership of the State Bar concerning judicial retention criteria poses no conceivable threat to the integrity of the electoral process; rather, it adds to the quantum of information in the public arena. Both Murray's speech and the Public Education Program offered the public another method of evaluating and thinking about judicial retention, which is a far cry from the manipulation of the electorate the *Stanson* limits are designed to prevent.

By upholding the trial court's ruling, this Court will reaffirm the principles enunciated in *Stanson* and *Miller*:



that government speech plays an important role in informing, educating and persuading the public, within the limits that it be fair and non-manipulative; and that public officials may express their views, so long as the expression is not misleading, channels of communication are open to citizens, and private speech is not drowned out. These principles protect the ability of government to govern, as well as the exercise of free choice by voters, in a way that maximizes the total amount of speech in the public arena. These principles protect the right of all citizens to have access to ideas and to hear speech.

#### IV. CALIFORNIA LAW COMPLIES WITH FEDERAL CONSTITUTIONAL REQUIREMENTS

Federal law also recognizes that the public has a protected right under the First Amendment to receive a balanced presentation of views on diverse matters of public concern; the purpose of the First Amendment is to preserve an uninhibited marketplace of ideas. *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364, 82 L. Ed.2d 278, 290-92, 104 S. Ct. 3106 (1984) (permitting editorializing by broadcasters receiving funding from federal government). This is, of course, the same notion that underlies the *Stanson* and *Miller* decisions, which recognize the need for the government to speak and to disseminate ideas to inform the voters.

##### A. Federal Law Permits Government Speech

The United States Supreme Court has made clear that the government is entitled to use taxpayer funds to express, or to subsidize the expression of, a particular viewpoint. There need be no compelling governmental interest to support such expenditures; only a rational relationship to legitimate governmental purposes is required. *Regan v. Taxation with Representation of Washing-*

*ton*, 46 U.S. 609, 76 L. Ed. 2d 129, 138-40, 103 S. Ct. 1997 (1983) (subsidizing speech of veterans' group through tax exemption). *See also Common Cause v. Bolger*, 574 F. Supp. 672 (1982), *aff'd*, 461 U.S. 911, 77 L. Ed. 2d 280, 103 S. Ct. 1888 (1983) (summary affirmance upholding incumbent's right to franking privilege despite impact added to incumbent's speech). Taxpayer monies may be used to promote views with which other taxpayers may disagree; this does not give the objector a constitutionally protected right to enjoin those expenditures. *League of Women Voters, supra*, 82 L. Ed. 2d at 295, n.16. *See also Pacific Gas and Electric Co. v. Public Utilities Comm. of Calif.*, — U.S. —, 89 L. Ed. 2d 1, 18, n.3, 106 S. Ct. 903 (1986) (Marshall, J., concurring) (government subsidy of a preferred speaker causes no interference with anyone else's speech).

##### B. Required Association With The State Bar Does Not Violate Plaintiffs' Freedom of Association

In 1961 the United States Supreme Court rejected a claim by Wisconsin lawyers that compelled membership in Wisconsin's integrated bar violated their freedom of association. *Lathrop v. Donohue*, 367 U.S. 820, 6 L. Ed. 2d 1191, 81 S.Ct. 1826 (1961). As is true in California, all practicing attorneys were required to be members, and the only act required was the payment of fees.

"We therefore are confronted, as we were in *Railway Employees Dept. v. Hanson*, 351 U.S. 225, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." 367 U.S. at 828.<sup>8</sup>

<sup>8</sup>For the Court, the associational issues raised by an integrated bar were far simpler than those raised by unions; thus having approved mandatory unions, approval of the integrated bar necessarily fol-



It is significant, however, that in Wisconsin, as in California, the mandatory bar association engaged in expressive activities. That expression was held not to violate the associational rights of the members. 367 U.S. at 827-28.

### C. Speech Activity By the State Bar Does Not Implicate The Individual

The concurrence of Justices Harlan and Frankfurter in *Lathrop* addressed the Bar's activities in terms of their impact on the dissenter's speech rights as well.<sup>9</sup> They found the link between compulsory funding and the bar's speech far too attenuated to constitute a constitutional violation:

"What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other hand, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance." 367 U.S. at 858.

---

lowed. See *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 238, 100 L.Ed. 1112; 76 S.Ct. 714 (1961); *Lathrop supra*, 367 U.S. at 850 (Harlan, J., concurring).

<sup>9</sup>The plurality opinion in *Lathrop* solely addressed the associational claim. See *id.*

That degree of association has long been a significant part of first amendment jurisprudence, especially as it relates to government action.

While the first amendment precludes the government from forcing individuals to affirm a certain belief, that affirmation must be directed in order to prevent the government from speaking. The relationship between the government speech and the individual must be sufficiently direct so as to force the conclusion that the statement is the individual's own, or to force the individual to speak to disassociate himself from that position. Thus, government cannot force an individual to recite the pledge of allegiance and salute the flag, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 2d 1628, 63 S. Ct. 1178 (1943), nor can it force the individual to carry a slogan attached to his personal property by printing it on his automobile license plates. *Wooley v. Maynard*, 430 U.S. 705, 51 L.Ed. 2d 752, 97 S. Ct. 1428 (1977). Government expression of a point of view using taxpayer money, however, is not the kind of direct association and identification with a point of view forbidden by these cases. *League of Women Voters, supra*, 82 L. Ed. 2d. at 295, n.16.

Measuring the directness of the association with the expression in question as the test accords with the teaching of the United States Supreme Court dealing with constitutionally protected rights to associate or not associate. Not all associations deserve, or get, the same protection. Rather, a sliding scale based on the intimacy of the association determines the right. See, e.g., *Roberts v. Jaycees*, 468 U.S. 609, 82 L.Ed. 2d 462, 104 S. Ct. 3244 (1984). In *Jaycees*, the Court held that the Minnesota Jaycees organization could be required by state law to permit women to be members. Recognizing a spectrum of types of association ranging from intimate familial associ-

ation to association in impersonal, large business organizations, the Court found that while choice concerning the former is constitutionally protected, forced association with entities or persons in larger organizations at the other end of the spectrum, such as the Jaycees, may not be protected. *See also Hishon v. King & Spalding*, 469 U.S. 69, 81 L.Ed. 2d 59, 68-69 (1985) (right of partners of a law firm not to associate with a certain individual may take secondary position to other governmental and societal interests).

This case is at the other end of the spectrum from *Barnette* and *Wooley*. There is no direct association of an individual member of the State Bar with any of the public positions taken by the Bar that rises to the level of personal affront disapproved in *Barnette*, nor is there is a physical and constant proximity of expression similar to that forbidden in *Wooley*.

In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, — U.S. —, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986), the United States Supreme Court confirmed that proximity is the critical factor. The Court refused to require a utility to include within its mailing envelope material prepared by a group opposing the utility's point of view. The Court reasoned that the physical proximity of that opposing statement could require the utility to speak to disassociate itself from the view being expressed, even though the utility may have otherwise chosen to exercise its right not to speak on that issue. 89 L.Ed.2d at 12. Like the owner of the car in *Wooley*, the utility could not be forced to use its own property to carry the message with which it disagreed. *Id.* at 13. Here, there is no proximity between the message put forward by the Bar and any individual; the difference in degree remains a difference in substance.

Moreover, the Supreme Court has made clear even where speech rights are involved that there is another fundamental consideration involved: the need to avoid content-based regulation. This overarching principle provides a standard with which *Stanson* and *Miller* comply, but with which the decision of the Court of Appeal does not. The decision of the Supreme Court in both *Pacific Gas and Electric* and *League of Women Voters* clearly relied on this principle to forbid any restriction on speech, even government supported speech, that looked to the content of the speech to determine the protection to which it was entitled. 89 L.Ed. 2d at 10-11, 15; 82 L.Ed. 2d at 294. This principle thus prohibits the kind of analysis, based on content, required by the Court of Appeal.

#### V. THE STANDARDS GOVERNING PRIVATE LABOR ORGANIZATIONS SHOULD NOT BE APPLIED TO THE STATE BAR

##### A. The Labor Union Cases Are Not Applicable

Fundamental policy distinctions necessitate rejection of the Court of Appeal's theory that the State Bar may be treated in the same manner as a labor union. Even accepting the erroneous premise that the State Bar may, in some instances, not be a governmental entity, the State Bar is still a body mandated to serve the public interest, and given the broad authority to do so. A labor union, however, is a private organization created to serve the private, economic interests of its members, not to regulate its members and educate, inform, and assist the public about matters as to which it has special knowledge and skills.

The union or agency shop situation addressed in the cases relied on by the Court of Appeal does serves a



limited purpose beyond economics, in that it promotes labor peace by avoiding free riders. However, even that interest is tied to economics, as it is intended to prevent non-members from profiting from the union's representation of the bargaining unit as a whole without payment for that benefit. *See, e.g., NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41, 10 L.Ed.2d 670, 83 S.Ct. 1453 (1963).

In contrast, the purposes of a unified bar and the mandatory fees it receives are quite different. The unified bar is the vehicle through which lawyers fulfill their obligations to themselves, the courts, and the public. Whereas a union sets mandatory dues within the context of its private organizational needs, the mandatory fees paid by lawyers to the State Bar are set by the Legislature after consideration of the programs and activities proposed by the State Bar and carried out by the State Bar in the past.

Given the significant differences in the functions, purposes, and goals of these very different organizations, it is inappropriate to adopt the same standards for judging their activities. The Court of Appeal itself recognized that the State Bar "is not just a trade union" but "bears a special public responsibility and . . . a commensurate right to speak in the public interest . . . ." *Op.* at 54. However, the standards applied by the Court, designed to prevent private economic organizations from infringing on the rights of their members, do not permit the State Bar the space within which to perform the functions that the Legislature and the people of California have authorized it to perform, and which the United States Supreme Court recognized as necessary to informed governance.

## B. The Court of Appeal Improperly Adopted "Political and Ideological" As a Standard for Evaluating Speech of The State Bar

Union dues may be governmentally compelled as a condition of employment because collective bargaining contributes to the public's interest in labor peace, and hence must be devoted to activity that serves this interest. The phrase "political and ideological and not germane to collective bargaining" defines one form of union activity that does not serve this interest.

However, the function of state government and its individual units is inherently "political and ideological." State government exists to carry out the political function of governing. Governance inherently involves choices among ideological options. The ideology of representative democracy is chosen over the totalitarian state, separation of powers is chosen over an all powerful single branch, and impartiality of the judiciary is chosen over courts controlled by the central committee of a single party state. The ideology of the rule of law is chosen over *ad hoc* determination or resolution of disputes based upon political or social status. Foundations which promote diverse viewpoints are granted tax subsidies because the ideology favoring their autonomy is chosen over another — that other taxpayers should not have their bill increased despite their disagreement.

It is, however, the interest in having government govern effectively that binds the governed in an association called "citizenship," and in subgroups within this broad category. It is this interest that justifies the imposition of taxes and fees to finance governmental activity.

The very concept of a unified bar is "political and ideological," but fully justified by the governmental inter-



est served. Lawyers must play several roles. In some, they are properly self interested, as when they associate to improve the profitability of their practices. In others, they serve the interests of particular classes of clients or geographical regions, as when they associate in special interest or regional bar associations. In the overarching sense, however, lawyers are officers of the court, and of the judicial branch. In this role their special status and monopoly requires that they serve the public interest.

The unified bar is the vehicle by which lawyers are held to serve and do serve the public interest. The State Bar is the vehicle by which self interest, special interest and regional interest are subordinated to the public interest. It is true that the concept of service to the public interest is ideological and political. It is equally true that dedication to the public interest is dedication to the governmental interest.

The mistaken use by the Court of Appeal of the phrase "political and ideological" as the touchstone of its opinion led the court into two other errors. Faced with the self evident need to permit some scope of activity to the State Bar, the Court of Appeal drew an artificial and arbitrary distinction between functions mandated by statute which it held could be performed irrespective of their inclusion within the catch phrase "political or ideological," and discretionary functions proscribed unless they could not be so classified.

Thus the court found nothing wrong with the State Bar's activity in the admission and discipline of lawyers despite the ideological nature of the concept of the practice of law as a restricted profession and the political, in the board sense, character of the administration of rules of admission and discipline. However as to the functions of administration of justice and advancement of the sci-

ence of jurisprudence assigned to the State Bar, the Court of Appeal proscribed activity fitting the catch phrase.

Having taken this step, the Court of Appeal was faced with the logical necessity of defining "political and ideological" in the context of activities of an institution not a labor union: one where the phrase does not automatically describe conduct unrelated to the relevant governmental interest. Here the Court of Appeal abandoned both logic and its labor union analogy. It eliminated germaneness from its test. Worse, the Court of Appeal failed to define the dimensions of the phrase. Rather, the intermediate court's opinion relies on examples that belie "political and ideological" as a standard. The Court of Appeal condemns a State Bar Public Education project concerning standards for evaluating the state judiciary and at the same time suggests that advocacy of six person juries is permissible (Op. at 49-51, 54), yet both are ideological and political in character. Faced with the bankruptcy of decision upon the basis of an out of context catch phrase, the Court of Appeal has in the end retreated to content-based censorship.

#### C. Decisions In Other Jurisdictions Dealing With Unified Bars Do Not Deal With the Issue Central to this Case

Plaintiffs have relied heavily on decisions involving other state bars, while ignoring the differences between those bars and this one. Many state bars, unlike California's, are created by the state Supreme Court, rather than an express legislative mandate. In certain of those states, the courts, in the exercise of their rule-making authority, have chosen to limit the bar's activities by applying *Aboud*-like standards. See, e.g., *Falk v. State Bar*, 411 Mich. 63, 305 N.W. 2d 201 (1981) (Michigan State Bar).

Unlike those states, the limits on the California State Bar, as set forth above, are imposed and regulated by the legislature.

Three federal cases have also addressed issues raised by the expenditure of mandatory fees by an integrated bar. The first, *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982), was a decision by a single federal district court judge, never reviewed by an appellate court. In addition, the judicial rule establishing the New Mexico bar did not mandate the broad scope of public duty imposed on the California State Bar by the Constitution and legislature. Finally, *Arrow* ignored the *Abood* prohibition against injunctive relief restraining organizational speech.

The Second case, *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963 (1983), rev'd and remanded, *sub. nom. Romany v. Colegio de Abogados de Puerto Rico*, 742 F. 2d 32 (1st Cir. 1984), concerned the State Bar of Puerto Rico. That case involves a situation with special problems; the Puerto Rico bar engages in activity clearly unrelated to its mandate or authority such as advocating the independence of Puerto Rico.

Finally, the Eleventh Circuit recently applied *Abood* to the Florida Bar. *Gibson v. The Florida Bar*, \_\_\_\_ F. 2d \_\_\_\_ (11th Cir, September 15, 1986, slip opinion). In that case, involving a bar created by rule of court, the Federal Court looked to *Abood* for guidance, as it found that *Lathrop* had not determined the issue. (Slip. Op. at 4) The court also relied on the Court of Appeal decision now under review by this Court. (Slip Op. at 6) As this Court has now vacated that decision, the reasoning of the *Gibson* decision on the difference between a labor union and a mandatory bar is suspect.

#### D. The Court Incorrectly Interpreted The *Abood* Standards

Even if the union cases were applicable to public agencies in California, the standards set forth in them have been incorrectly interpreted and applied by the Court of Appeal.

The Court of Appeal at a number of places in its opinion suggests that the Supreme Court opinions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), and *Chicago Teachers Union v. Hudson*, 84 U.S.L. W. 423, 89 L.Ed.2d 232, 106 S.Ct. 1066 (1986), adopted a compelling state interest test for analysis of activities of unions that have political or ideological content. It required that the State Bar meet this rigorous test, specifically applied in other areas of constitutional jurisprudence, for its activities.<sup>10</sup> (Op. at 3.) *Ellis* recognized that in the union context certain germane activities, categorized without definition as political or ideological, may present an additional infringement upon individuals' rights that must be justified.<sup>11</sup> However, neither *Abood* nor any of the decisions that follow its guidelines adopted the compelling state interest test. Indeed, if they had, these cases could not have held that political and ideological speech of unions germane to collective bargaining may be financed with dues collected

<sup>10</sup>Although the Court of Appeal held the State Bar not to be a governmental unit, it paradoxically subjected its speech to a test reserved for governmental action — the compelling state interest test. See *First National Bank of Boston v. Bellotti*, 453 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707, (1978).

<sup>11</sup>One example of such activity might be promotion of legislation compelling rehiring of former air traffic controllers discharged because of an illegal strike.



over the objection of a member. The public interest in labor peace that justifies this union conduct is important but by no means compelling. The conclusion that free ridership may detract from labor peace is rational but not compelled.

The Court of Appeal's ruling thus departs in the most significant manner from the very precedents from which the Court claimed support for its ruling. Moreover, by applying a more stringent standard than that adopted by the United States Supreme Court, the Court of Appeal complicates what it recognizes to be a difficult task of drawing lines while permitting sufficient play for the State Bar to fulfill its duties. (Op. at 54.) The compelling state interest test invites content-based decisionmaking, limiting the ability of the State Bar, even in what the Court concedes are governmental functions, to remain free to speak, as government must, on controversial issues.

#### E. The Court Of Appeal's Unwarranted Expansion Of The *Abood* Test Conflicts With First Amendment Rights.

If the Court of Appeals' view were accepted, and the State Bar treated as a private organization, then the State Bar's free speech rights would have to be recognized as those of a private entity. See *First National Bank of Boston v. Bellotti*, 453 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978). The Court of Appeal's test fails to do so.

The test subjects the State Bar to the threat of post hoc judicial review of the content and viewpoint of its speech activities, allowing a particular judge to determine whether a particular speech is "ideological" or "political." However, judges, as government officials, may not impose restrictions on nonobscene speech based on either its

content or its viewpoint. See *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 95-96 92 S.Ct. 2286, 33 L.Ed.2d 212, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, 363-64 (1976).

Moreover, the test possesses neither the clarity nor predictability necessary to prevent the exercise of protected free speech rights from being chilled. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) 84 S. Ct. 710, 11. L.Ed.2d 686; *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

#### 1. *Abood* Protects Free Speech

The United States Supreme Court's test for when union speech may be financed from the members' compelled dues accommodates both the rights of the group to speak and the speech rights of dissenters not to be forced to subsidize speech unrelated to the purpose of their dues — to pay for benefits they receive from the union's collective bargaining. The Court recognized the group's right to promote the cause that brought it together; within these boundaries dissenters' speech rights are subordinate to those of the group. *Abood, supra*, 431 U.S. at 223. In the union context, the Court was able to identify categorically this core area of speech activity that reasonably related to negotiation, approval, and administration of collective bargaining agreements of the particular union and its members' employers. *Ellis, supra*, 466 U.S. at 456. All other categories of speech, such as endorsements of candidates for national office, must be financed through voluntary contributions, to groups like union political



action committees, which still may, however, speak in the union's name.<sup>12</sup>

The certainty and predictability of the Court's test in *Abood* and *Ellis* is evidenced by the facts of the recent *Hudson* decision: both the union and dissenters agreed in advance of litigation that certain categories of expenditures could not be financed from compelled dues; the case turned only on the sufficiency of the union's rebate procedures. 89 L. Ed. 2d 232. This functional approach not only provides group speakers with advance notice of what is forbidden, but also avoids the specter of judges passing on the content or viewpoint of union speech. The printing of a union president's speech on why a contract should be ratified, regardless of the political ideology it may express, is permitted; distribution of a speech, however innocuous, on public schools is not.

## 2. The Expanded Court of Appeal Test Prevents Speech

The Court of Appeal's insistence that even speech "germane to the purpose that brought the group together" must be tested further by a court for political or ideological content disturbs the balance struck in *Abood* and with it the safeguards on the State Bar's free speech. First, clarity and predictability are destroyed because the State Bar cannot know in advance which expressions a particular judge will find to be ideological or political. The court's statement that speech on jurisprudence and the administration of justice is permissible so long as it is not political or ideological provides an unworkable standard that is unconstitutionally vague. See *Kolender v.*

<sup>12</sup>Thus, plaintiffs' request for an injunction enjoining bar officials from speaking in the name of the State Bar is legally groundless.

*Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903, 910 (1983) (vagueness doctrine is concerned with arbitrary suppression of First Amendment liberties).

"Jurisprudence," however, is ideological. Jurisprudence and the administration of justice are concerned with the relations of our political institutions to one another, defining their proper spheres and providing neutral criteria for evaluating political institutions, laws and procedures. See H. Hart and A. Sacks, *The Legal Process* 1-9 (tentative ed. 1958). They cannot be understood without resort to the ideology underlying the state system — that of constitutionalism. Politics and ideology are inextricably intertwined with the purpose and function of the State Bar as an arm of the legal system. Cf. Yudof, *When Government Speaks*, 171 (virtually impossible to disentangle partisan from nonpartisan speech of public officials); (see also *Regan, supra*; *Bolger, supra*). The standard announced in the appellate opinion thus reduces to a tautology: speech on the subject of the state's political system and its underlying ideology is permissible, so long as it is neither political nor ideological. The opinion provides no guidance to the State Bar as to what categories of speech are prohibited; lobbying the State legislature may be permitted, depending on how compelling the court finds the governmental interest served by the lobbying. Because the standard itself will only take shape as courts proceed on a retrospective, case-by-case basis, it unconstitutionally abridges the State Bar's freedom of speech. L. Tribe, *American Constitutional Law* § 12-26 at 715; *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).

### 3. Unrestrained Personal Liability Will Inhibit Protected Speech

If State Bar officials cannot know in advance which speech may be financed through use of compelled dues, they cannot act to express any view without the risk of personal liability if any lawyer in the state later objects. State Bar officials will subject themselves to potential liability whenever they speak on a subject other than attorney admission and discipline. The chilling effect created by the court's vague standard is not merely a legal cliché; the facts of this case illustrate that the threat of personal liability on the part of State Bar officials is one that is terribly real. *Cf. NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, 418 (1963) (threat of sanctions may deter protected speech almost as potently as actual sanctions). *See also Stanson v. Mott* 17 Cal. 3d 206, 226 (1976) (rejecting strict liability for public officials because public interest would suffer if public officials are deterred from informing the public.)

The combined effect of the vagueness and content/viewpoint discrimination inherent in the Court of Appeal's approach, if adopted, could threaten to silence of the leaders of the State Bar on issues that deeply touch the practice of law, and on which they have a valuable contribution to make to public discourse. Although this is a more insidious ban on speech than the direct legislative ban on corporate speech overturned in *First Nat. Bank of Boston v. Bellotti*, *supra*, the effect is the same, and it is an effect that the First Amendment will not tolerate. *Id.* As Justice Powell stated in *Bellotti*, "it is by no means an automatic step from the remedy in *Abood*, which honored the interests of the minority without infringing the majority's rights, to the position . . . which would completely

silence the majority because a hypothetical minority might object." 55 L.Ed. 2d at 729, n. 34.

### 4. The Court of Appeal's Test Is Based On Prohibited Content-Based Discrimination

Finally, the Court of Appeal's test is defective because of its inherent content and viewpoint discrimination. The opinion does not fault the State Bar for using compulsory dues to finance the swearing-in speech of a new president, or for the distribution of the speech, or for a public education project concerning criteria for evaluating the state judiciary. Rather, the opinion candidly prohibits these speech activities because of their viewpoint. *Op.* at 49-50. At the same time, the opinion suggests that advocacy by State Bar officials of a change in the structure of the jury system would be permissible under its approach. *Op.* at 54. The only logical distinction between the prohibited and the permissible speech above is that the former is currently controversial, while the latter, at least for now, may be somewhat less controversial but approved by one panel of the Court of Appeal.<sup>13</sup> Thus, the Court of Appeal's opinion invites judges to pick and choose, by content and by viewpoint, issues the State Bar may address. Such judicial censorship violates the fundamental first amendment precept that governmental restrictions on speech cannot favor certain communicative contents, or particular viewpoints, over others. *Met-*

<sup>13</sup>To the extent that the opinion seems to suggest that the State Bar limit its advocacy to procedural, rather than substantive issues, it flies in the face of Supreme Court rulings that a substance/procedure distinction is too nebulous to provide a workable legal standard. *See e.g., Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8, 16, (1965) (the line between substance and procedure shifts as the legal context changes).



*romedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, 819, 822 (1981).

## VI. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE INDIVIDUAL DEFENDANTS

### A. The Judgment in Favor of the Individual Defendants was Required by Law

None of the union cases provide any basis for the imposition of personal liability. More importantly, in holding that the challengers could not halt union activity, but could only raise questions of funding, the union cases preclude any basis for personal liability for approving the challenged activities. *See e.g., Abood, supra*, 431 U.S. at 238-41.

The Court of Appeal reversed a summary judgment in favor of the individual defendants on the issue of personal liability. Although reversing the judgment, the Court held

"that the individual defendants *may not be held responsible for expenditures which are authorized by statute* but which impermissibly impinge upon plaintiff's First Amendment rights under *Abood* and *Ellis*. This is so because, as we have noted, the Constitution does not forbid such expenditures; it only requires that they not be financed with the compulsory dues of the dissenters." Op. at 57-58 (emphasis added).

The Court thus held that the defendants could upon "a proper showing" be required to reimburse the State Bar for funds expended *in excess* of the Bar's statutory authority. *Id.* The Court, while rejecting the standard established by *Stanson* permitting liability only where there has been a showing of a lack of good faith and due care, did not state what standard *would* apply. The Court also did

not decide whether the Board members act as public officials in overseeing State Bar activities other than regulation of the practice of law. Op. at 58-59, n. 17.

The Court erred in reversing the judgment in favor of defendants because plaintiffs never alleged that the individual defendants acted without good faith or due care. Nothing in the record supports a finding that these individuals acted in bad faith or without due care. *Stanson v. Mott, supra*.<sup>14</sup> Plaintiffs specifically conceded that they were *not* claiming that the challenged activities were outside statutory authority. (*See* Appellants' Opening Brief at 14, 19; Respondent's Transcript, December 16, 1983 at 28; Petition for Rehearing at 7-8.) Indeed, the uncontroverted O'Rourke declaration demonstrates that in their activities, the individual defendants were following a more than fifty-year-old tradition of the State Bar (O.F. at 289-303).

Clear standards need to be enunciated to clarify to what extent and under what circumstances members of the Board, as well as other directors and officers of public agencies, face personal liability in performing their public service functions. The Court of Appeal's error in finding the State Bar sometimes does not act as government indicates other agencies may also be found to act as private associations in some instances. Individuals who direct such agencies thus face the possibility that the standards of the union cases will be applied to the activities they oversee, and that they may be personally liable if these activities are found improper long after they have been approved.

<sup>14</sup>In addition, defendants cannot be held personally liable under 42 U.S.C. § 1983 because they cannot be shown to have violated "a clearly established constitutional norm." *Scott v. Dixon*, 720 F.2d 1542, 1547 (11th Cir. 1983), *cert. denied*, 105 S.Ct. 122.



The uncertainty in the Court of Appeal's approach, if adopted by this Court, will affect numerous commissioners, agency directors and members of boards who will wonder what standards govern their work. All will fear that some of the controversial activities they oversee will someday be deemed nongovernmental. The lack of standards and guidance forces them to guess at their peril which activities will subject them to personal liability; that uncertainty could paralyze responsible individuals. The chilling effect of this prospect on such individuals' decisionmaking, and thus the ability of government to speak and govern, underlines the crucial need for standards.

**B. The Court of Appeal Decision Improperly Requires The State Bar To Justify Each Of Its Activities In Response To A Categorical Challenge.**

Plaintiffs have not singled out for challenge particular activities of the State Bar. Rather, they categorically challenge types of activities, for example, lobbying, filing amicus briefs and publicizing presidents' speeches. The Court of Appeal erroneously found that while defendants showed each of these categories of activity was legislatively authorized, they failed to meet their burden of proof on summary judgment because they did not justify every single activity of the State Bar within these categories:

"The State Bar has made no showing . . . that it did not use compelled membership fees to advance political and ideological causes which were not reasonably related to the regulation of the practice of law or the advancement of the administration of justice, or if germane, which do not impose additional and unjustified

burdens on First Amendment rights." (Op. at 12.)

To require an agency such as the State Bar to respond to categorical challenges by justifying every single activity within a sweeping attack improperly imposes a devastating burden on such agencies, which is not justified under Code of Civil Procedure Section 437(c). While a party moving for summary judgment has the burden to disprove its opponent's case, it need do so only with reference to the pleadings. Weil & Brown, *Civil Procedure Before Trial*, §§ 10:10, 10:116 (1984) Thus, where the complaint attacks only broad categories, seeking to preclude all activity within a category as opposed to attacking specific activity, a defendant is entitled to summary judgment if it establishes as a matter of law that any substantial activity within the category is permitted. This is particularly the case where the activity attacked is speech. See *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755-58, (June 25, 1986) Otherwise the burden of proving validity of hundreds or thousands of items within the category is itself an impermissible burden on expression. See *id.*

**C. The Undisputed Facts Establish Defendants' Right To Prevail As A Matter Of Law.**

The Superior Court properly granted defendants' motion for summary judgment on a record devoid of disputed material facts, where defendants had established that their activities did not violate the first amendment under the applicable legal standards. CCP § 437c; *Angelus Chevrolet v. State*, 115 Cal.App. 3d 995 (1981) (where undisputed facts established public corporation hospital was state entity, summary judgment proper on issue of whether indemnity action could be maintained

against it). Summary judgment is the favored procedure in cases involving free speech, *Environmental Planning and Information Council of Western El Dorado County, Inc. v. Superior Court*, 36 Cal. 3d 188 (1984), and it was particularly appropriate in this case, where plaintiffs sought to impose upon State Bar officials both a prior restraint and personal liability. See also *Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County*, 222 Cal. 3d 672 (1978), cert. denied, 441 U.S. 961, 60 L.Ed. 2d 1066, 99 S.Ct. 2406; *Sipple v. Chronicle Pub. Co.*, 150 Cal.App. 3d 140 (1983).

It is undisputed that the State Bar lobbies the legislation for the passage of legislation, files amicus curiae briefs, has engaged in public education programs concerning the legal system, has publicized the speeches of former president Murray, and helps finance meetings of the Conference of Delegates.<sup>15</sup> Although throughout this litigation plaintiffs have failed to specify the activities to which they object, defendants provided the Superior Court with the summary of State Bar activities presented to the Legislature (Declaration of Mary G. Wailes, Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Ex. 1 thereto), a summary of recent amicus briefs filed by it (Supplemental Truitt Declaration in Support of Defendant's Motion for Summary Judgment), a summary of the historic activities of the State Bar (O'Rourke Declaration, Defendants' Motion for Summary Judgment), a copy of the challenged public education program (Ex. 4 to Defendants' Opposition to Motion for Preliminary Injunction), and the State Bar's legisla-

---

<sup>15</sup>Plaintiffs in moving for partial summary judgment on the ground that these activities violated first amendment rights submitted no evidentiary material, conceding that the only disputed issues in the case are legal.

tive materials (Ex. 5, 8-10 to Defendants' Opp. to Preliminary Injunction). Defendants responded to every specific allegation contained in the amended Complaint.<sup>16</sup>

Thus, even if *Abood* applies, the Court should affirm the summary judgment on the ground that as a matter of law, the record shows that the challenged activities are germane to the purpose of the State Bar under the *Abood* standard. A trial on this issue would serve no purpose as all the material facts about the challenged activities are in the record, and further protracting these proceedings would be contrary to the policy established by this Court and the United States Supreme Court.

---

<sup>16</sup>As defendants have shown *supra*, at § VB, plaintiffs' blanket challenge to any "ideological and political activity" is of itself a meaningless phrase because of the nature of the State Bar.

# VII. CONCLUSION

For the reasons set forth above, the defendants respectfully request that this honorable Court affirm the summary judgment entered by the trial court and continue the long-established standards that permit the State Bar to fulfill its functions in serving the people of California.

DATED: October 10, 1986.

Respectfully submitted,

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE

HUFSTEDLER, MILLER,  
CARLSON & BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
JUDITH R. STARR

By ROBERT S. THOMPSON  
ROBERT S. THOMPSON

*Attorneys for Defendants/  
Respondents/Appellees  
State Bar of California  
and certain individual  
Defendants*

# PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA - }  
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, CA 90015.

On June 21, 1989, I served the within Respondents' Brief in opposition in re: "*Eddie Keller v. State Bar of California, et al*" on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Ronald A. Zumbrun  
John H. Findley  
\*Anthony T. Caso  
\*Counsel of Record  
Pacific Legal Foundation  
2700 Gateway Oaks Drive, #200  
Sacramento, CA 95833

All parties required to be served have been served.



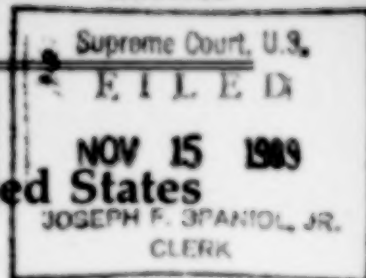
I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 1989, at Los Angeles, California.

*Ce Ce Medina*

CE CE MEDINA

In The  
**Supreme Court of the United States**  
 October Term, 1989



EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

On Writ of Certiorari in the Supreme Court of California

JOINT APPENDIX  
 VOLUME I

HERBERT M. ROSENTHAL  
 \*DIANE C. YU  
 \*Counsel of Record  
 555 Franklin Street  
 San Francisco, CA 94102  
 (415) 561-8200  
*Attorneys for Respondents*  
 (Additional Counsel listed  
 on inside cover)

RONALD A. ZUMBRUN  
 JOHN H. FINDLEY  
 \*ANTHONY T. CASO  
 \*Counsel of Record  
 PACIFIC LEGAL FOUNDATION  
 2700 Gateway Oaks Drive, Suite 200  
 Sacramento, CA 95833  
 Telephone: (916) 641-8888  
*Attorneys for Petitioners*

Petition for Certiorari filed May 24, 1989.  
 Certiorari granted October 2, 1989.

HUFSTEDLER, MILLER, KAUS  
& BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

JUDITH R. STARR

355 South Grand Avenue

-45th Floor

Los Angeles, CA 90017

(213) 617-7070

*Attorneys for Respondents*



## TABLE OF CONTENTS

	Page
<b>VOLUME I</b>	
Chronological List of Relevant Docket Entries.....	1
Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief .....	2
Amendment to Petition for Writ of Mandate and Com- plaint for Declaratory and Injunctive Relief .....	27
Second Amendment to Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief .....	31
Answer .....	35
Memorandum of Points and Authorities in Opposi- tion to Motion for Preliminary Injunction.....	40
Exhibit 2 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction .....	75
Exhibit 5 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction .....	126
Declaration of Mary G. Wailes in Support of Defen- dants' Opposition of Motion for Preliminary Injunction.....	155
Declaration of Magdelene Y. O'Rourke in Support of Defendants' Opposition of Motion for Preliminary Injunction.....	198
<b>VOLUME II</b>	
Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction-Errata .....	214
First Amended Answer (C.C.P. § 472).....	216

TABLE OF CONTENTS - Continued

	Page
Order Denying Preliminary Injunction and Dissolving Temporary Restraining Order.....	222
Second Amended Answer .....	225
Declarations in Support of Motion for Summary Judgment .....	232
Index to Attachments to Motion for Partial Summary Judgment .....	234
VOLUME III	
Supplemental Points and Authorities in Support of Defendants' Motion for Summary Judgment and [Defendants'] Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment .....	433
Supplemental Declarations in Support of Defendants' Motion for Summary Judgment.....	436
Notice of Correction of Defendants' Supplemental Declarations in Support of Defendants' Motion for Summary Judgment .....	470
Ruling of Superior Court .....	477
Opinion of the Court of Appeal, Third Appellate District .....	480
Reply Brief on the Merits of Defendants/Respondents/Appellees.....	537
Opinion of the California Supreme Court .....	556

CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES

October 25, 1982 - Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief filed in Sacramento County Superior Court.

March 29, 1983 - Second Amended Answer filed by defendants in Sacramento County Superior Court.

November 22, 1983 - Motion for Summary Judgment filed by defendants in Sacramento County Superior Court.

November 23, 1983 - Motion for Partial Summary Judgment filed by plaintiffs in Sacramento County Superior Court.

March 19, 1984 - Order granting defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment issued by Sacramento County Superior Court.

May 24, 1984 - Judgment in favor of defendants entered by Sacramento County Superior Court.

June 18, 1984 - Notice of Appeal filed by plaintiffs in Sacramento County Superior Court.

May 23, 1986 - Decision of the California Court of Appeal, Third Appellate District, reversing the judgment of the Sacramento County Superior Court.

July 2, 1986 - Petition for Review filed by defendants in California Supreme Court.

August 28, 1986 - Review granted by the California Supreme Court.

February 23, 1989 - Decision of the California Supreme Court reversing the judgment of the California Court of Appeal, Third Appellate District.

RONALD A. ZUMBRUN  
 JOHN H. FINDLEY  
 ANTHONY T. CASO  
 Pacific Legal Foundation  
 455 Capitol Mall, Suite 600  
 Sacramento, California 95814  
 Telephone: (916) 444-0154  
 Attorneys for Petitioners  
 and Plaintiffs

IN THE SUPERIOR COURT OF THE  
 STATE OF CALIFORNIA  
 IN AND FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER; RAYMOND )  
 BROSTERHOUS; DAN M. KINTER; )  
 and DAVID LAMPE, ) Civ. No. 307168  
 Petitioners and Plaintiffs, )  
 v. ) PETITION FOR  
 ) WRIT OF MAN-  
 STATE BAR OF CALIFORNIA, a ) DATE AND COM-  
 public corporation; ANTHONY M. ) PLAINT FOR  
 MURRAY; PATRICA GREENE; GIRT ) DECLARATORY  
 K. HIRSCHBERG; LELAND R. ) AND INJUNC-  
 SELNA, JR.; GEOFFREY VAN ) TIVE RELIEF  
 LOUKS; THOMAS W. ERES; JOHN ) (Excluding  
 J. COSTANZO; GEORGE W. ) Exhibit E)  
 COUCH, III; BURKE M. CRITCH- )  
 FIELD; THOMAS R. DAVIS; DIXON ) Endorsed  
 Q. DERN; RUTH CHURCH GUPTA; ) Oct 25 1982  
 DALE E. HANST; LEONARD HERR; )  
 ROBERT A. HINE; PHYLLIS M. HIX; )  
 MARTA MACIAS; PHILLIP )  
 SCHAFER; CRAIG A. SILBERMAN; )  
 DANIEL J. TOBIN; JAMES D. )  
 WARD; and JOON HEE RHO, )  
 Respondents and Defendants. )

INTRODUCTION

1. The California Constitution requires all persons licensed to practice law in this state to be members of the State Bar of California (State Bar). Cal. Const. art. VI, § 9. California law further requires all members of the State Bar to pay dues to the Bar on pain of suspension from the practice of law. Bus. & Prof. Code §§ 6140, 6143. In this action, petitioners and plaintiffs, members in good standing of the State Bar, seek to restrain respondents and defendants, the State Bar of California and its Board of Governors, from expending these mandatory assessments for political and ideological purposes in violation of petitioners and plaintiffs' constitutional rights to freedom of speech and association.

PARTIES

2. Petitioners, Eddie Keller, Raymond Brosterhous, Dan M. Kinter, and David Lampe are members in good standing of the State Bar of California and as such each is required to pay, has paid, and will continue to pay dues to the State Bar as required by law.

3. Respondent, State Bar of California, is a public corporation with its offices at 555 Franklin Street, San Francisco, California.

4. Respondents, Anthony M. Murray, Patricia Greene, Girt K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Louks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. Davis, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard



Herr, Robert A. Hine, Phyllis M. Hix, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward, and Joon Hee Rho, are members of the Board of Governors of the State Bar. The Board of Governors is the governing body of the State Bar and has the ultimate authority over expenditures of revenues derived from mandatory dues. Board member, Thomas W. Eres, is a resident of Sacramento County.

#### CLAIM

5. Article 6, section 9 of the California Constitution requires all persons licensed to practice law in California to be members of the State Bar of California. Business and Professions Code § 6140 further requires all persons licensed to practice law in this state to pay membership dues annually to the State Bar. Basic membership dues for active members who have been licensed for less than three years is \$95. All other active members are charged a basic dues of \$165. Failure to pay this dues results in suspension from the practice of law. Bus. & Prof. Code § 6143.

6. The State Bar of California, by and through the Board of Governors, has expended and will continue to expend substantial portions of the revenues derived from these mandatory dues payments to advance political and ideological causes, including, but not limited to:

a. lobbying the California State Legislature on various matters (a partial list of bills lobbied by the State Bar in 1982 is attached hereto as Exhibit A and incorporated herein by reference);

b. submitting briefs amicus curiae in various cases thereby taking positions in direct opposition to some of its dues paying members (a partial list of cases in which the State Bar has appeared as amicus curiae is attached hereto as Exhibit B and incorporated herein by reference);

c. financing meetings of the Conference of Delegates at which political and ideological causes are advanced (a partial list of the resolutions adopted at the most recent meeting of the Conference of Delegates is attached hereto as Exhibit C and incorporated herein by reference);

d. publicizing the political and ideological speeches of its President, Anthony M. Murray (copies of State Bar news releases publicizing some of those speeches are attached hereto as Exhibit D and incorporated herein by reference); and

e. financing a so-called "public information" project designed to disseminate to the general public a particular ideology regarding judicial retention elections (a copy of materials disseminated by the State Bar pursuant to this project is attached hereto as Exhibit E and incorporated herein by reference).

7. Petitioners and plaintiffs do not subscribe to many of the political and ideological causes as set forth above and object to the use of their mandatory dues to advance any of the political and ideological beliefs of the Board of Governors and the Conference of Delegates.

8. To require petitioners and plaintiffs to give financial support to any political and ideological causes, especially those which they find morally objectionable and repugnant to their privately held beliefs, violates petitioners and plaintiffs' First and Fourteenth Amendment rights to freedom of speech and association and their rights under 42 U.S.C. § 1983. *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977); *Arrow v. Dow*, \_\_\_ F. Supp. \_\_\_, No. 78-434-M Civil (D.N.M., July 16, 1982).

9. Petitioners and plaintiffs are irreparably harmed by this deprivation of their constitutional liberties and have no adequate remedy at law.

10. Petitioners and plaintiffs have no other remedies, other than this action, that would protect their constitutionally guaranteed freedoms of speech and association. The amount of the mandatory dues is set by statute and respondents and defendants are given no discretion to lower the amount of the dues or to rebate a portion of the dues to those members who, like petitioners and plaintiffs, object to the use of their mandatory dues for political and ideological purposes.

WHEREFORE, petitioners and plaintiffs pray as follows:

1. a declaration issue that respondents and defendants have violated petitioners and plaintiffs' constitutional rights through the expenditure of revenues derived from mandatory bar dues and the use of the name of the State Bar of California for political and ideological purposes;

2. an injunction issue restraining respondents and defendants from using mandatory bar dues or the name of the State Bar of California to advance political and ideological causes or beliefs;

3. an injunction issue compelling respondent and defendant members of the Board of Governors to reimburse the Treasury of the State Bar of California for all State Bar funds they have authorized to be expended since September 12, 1982, and which in fact have been expended for political and ideological purposes;

4. or, in the alternative, an alternative writ of mandate issue under the seal of this Court compelling respondents and defendants immediately to cease and desist from the use of mandatory dues and the name of the State Bar of California to advance political and ideological causes and compelling respondent and defendant, members of the Board of Governors, to reimburse the Treasury of the State Bar of California for all State Bar funds they have authorized to be expended since September 12, 1982, and which have actually been expended for political and ideological purposes or to appear before this Court at a time then or thereafter specified to show cause why a peremptory writ of mandate should not issue;

5. on return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue compelling respondents and defendants immediately to cease and desist from the use of mandatory dues and the name of the State Bar of California to advance political and ideological causes and further compelling respondent and defendant, members of the Board of Governors, to reimburse the Treasury of the State Bar

of California for all State Bar funds they have authorized to be expended since September 12, 1982, and which have actually been expended for political and ideological purposes;

6. petitioners and plaintiffs be awarded their costs of suit herein, including reasonable attorneys' fees; and

7. the Court grant such other relief as may be just and proper.

DATED: October 25, 1982.

Respectfully submitted,  
RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
ANTHONY T. CASO  
By /s/ Anthony T. Caso  
ANTHONY T. CASO

Attorneys for Petitioners  
and Plaintiffs

#### VERIFICATION

I, Eddie Keller, declare that:

I am one of the petitioners and plaintiffs in this action. Except as to the matters stated on information and belief, the facts contained in the foregoing Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief are within my own knowledge, and these facts are true of my own knowledge and, with regard to those matters stated on information and belief, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of October, 1982, at Sacramento, California.

/s/ Eddie Keller  
EDDIE KELLER

#### EXHIBIT A

#### PARTIAL LIST OF LEGISLATION THAT THE STATE BAR HAS LOBBIED EITHER FOR OR AGAINST BEFORE THE STATE LEGISLATURE

AB 129 - permits consideration of comparable worth in setting salaries for female-dominated positions in state employment.

AB 1166 - revises responsibilities of local agency human relations commissions.

AB 1706 - establishes a preference for joint custody of children by both parents after divorce.

AB 1787 - establishes when a manufacturer must replace an automobile that fails to conform to warranties.

AB 2383 - prohibits most state and local agency employers from requiring employees to take polygraph tests.

AB 2384 - permits the adoption of regulations requiring consideration of a child's race, ethnicity, and religion when placing that child for adoption or foster care.

AB 2392 - prohibits possession of armor piercing handgun ammunition.

AB 2436 - transfers the responsibility for air pollution regulation to the Resources Agency and creates an



unlimited right of action to sue anybody causing air pollution.

AB 2443 - makes various changes regarding the establishment and computation of "lifeline" public utility rates.

AB 2501 - creates criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors.

AB 2540 - deletes requirement that peace officers must be citizens of the United States.

AB 2800 - makes various changes in laws prohibiting employment discrimination on the basis of pregnancy.

AB 2964 - creates criminal sanctions for an employer's interference with an employee's communications to public officials.

AB 2965 - prohibits employers from requiring applicants to provide information on misdemeanor convictions more than seven years old.

AB 3026 - establishes a demonstration project to provide employment assistance and training to Aid to Families with Dependent Children recipients.

AB 3049 - limits the rights to individualized education programs for students in need of special education.

AB 3147 - provides for licensure and regulation of labor management consultants.

AB 3302 - makes various changes in laws regulating the adoption, amendment, and implementation of solid waste management plans.

AB 3427 - creates an unlimited exclusion from gift tax for gifts to pay for education tuition or medical care.

AB 3693 - requires court to consider the fixing of child support as a fixed percentage of income with an automatic annual percentage increase.

ACA 15 - authorizes the use of inmate labor by private firms.

ACA 59 - prohibits sex discrimination by the state.

ACA 69 - requires individuals receiving public social services funds from the state to be engaged in employment for the benefit of the people of the state.

ACA 76 - provides that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance.

AJR 63 - requests the Congress to enact laws not preempting state community property laws regarding federal pensions and other benefits.

SB 1574 - authorizes construction of prisons and makes various changes in the law regarding inmate labor.

SB 2037 - permits local governments to impose conditions on the operation of residential care facilities.

SCA 1 - deletes the requirement that local governments secure approval of the voters prior to constructing low rent housing projects.

SJR 29 - requests Congress to refrain from enacting a guest worker program or from permitting the importation of workers from other countries.

---

#### EXHIBIT B

##### PARTIAL LIST OF CASES IN WHICH THE STATE BAR HAS SUBMITTED BRIEFS AMICUS CURIAE

*Brosnahan v. Brown*, 32 Cal. 3d 236 (1982) (constitutionality of Proposition 8 - the Victims' Bill of Rights).

*Hustedt v. Workers' Compensation Appeals Board*, 30 Cal. 3d 329 (1981) (power of board to discipline attorneys practicing before it).

*Hays v. Wood*, 25 Cal. 3d 772 (1979) (requirement that attorney-public officials disclose names of clients).

*Merco Construction Engineers, Inc. v. Municipal Court*, 21 Cal. 3d 724 (1978) (nonattorneys appearing in court on behalf of a corporation).

*Court of Appeal v. Superior Court*, 21 Cal. 3d 121 (1978) (superseded statutes, jurisdiction).

*Comden v. Superior Court*, 20 Cal. 3d 906 (1978) (disqualification of law firm).

---

#### EXHIBIT C

##### PARTIAL LIST OF RESOLUTIONS ADOPTED BY THE CONFERENCE OF DELEGATES

Late filed Resolution No. 1 - endorsement for Proposition 15, the gun control initiative.

Late filed Resolution No. 2 - amendment of Civil Code regarding disqualification of appellate justices.

Late filed Resolution No. 3 - disapproval of the statements of senatorial candidate Pete Wilson regarding court review of the Victims' Bill of Rights.

Resolution No. 2-2-82 - endorsement of the nuclear weapons freeze initiative.

Resolution No. 2-4-82 - adoption of an Equal Rights Amendment for the California Constitution.

Resolution No. 2-5-82 - opposition to federal legislation limiting federal court jurisdiction over abortions, public school prayer, and busing.

Resolution No. 7-3-82 - supported principle of equal pay for comparable work.

Resolution No. 7-5-82 - provision of workers' compensation benefits for work time lost due to jury duty.

---

## EXHIBIT D

## NEWSRELEASE

SEAL

THE STATE BAR OF CALIFORNIA  
DIVISION OF COMMUNICATIONS  
555 FRANKLIN STREET  
SAN FRANCISCO, CALIFORNIA 94102

CONTACT: Mari Weaver  
(415) 561-8280

STATE BAR PRESIDENT CALLS ATTACKS ON  
JUDGES POLITICALLY MOTIVATED

SAN FRANCISCO, October 8 - State Bar of California President Anthony Murray today issued the following response to the formation of "Californians for Judicial Reform," a committee led by various Republican party leaders and organized to campaign for the defeat of three new justices of the state Supreme Court whose names will appear on the November 2 state ballot for voter approval of their 12-year appointive terms in office.

False and misleading statements made by a newly-formed committee of political partisans campaigning to defeat three California Supreme Court justices in the November election must be corrected.

The committee, which calls itself "Californians for Judicial Reform," claims it is not trying to politicize the judiciary. This claim cannot be accepted. Committee members are Republican party officials and candidates for office. Its leaders are the Republican Candidates for Attorney General, Lieutenant Governor and the Assembly, and a chairperson of the Santa Barbara County Republican Central Committee.

The names of the three justices will appear on the ballot in an uncontested election that, according to

law, must be nonpartisan. The Republicans' attack on the justices is a thinly-disguised and deplorable attempt to drag the Supreme Court into partisan politics and to accomplish political goals at the expense of our system of justice. The politicians want to remove the justices so they can appoint their own supporters if their candidate for Governor is elected.

The new Committee's claim that judges appointed by Governor Brown are "activists" and "pro-defendant" is as irresponsible as it is inaccurate. In 1981, 86.3 per cent of the persons charged with felonies in California were convicted. California imprisons a higher percentage of its criminal offenders than any other state or any other nation with available statistics, with the exceptions of South Africa and the Soviet Union. In 1977, 10,400 persons were committed to prison in California; in 1982, 19,000 persons already have been sent to prison. *Per capita* prison commitments have increased approximately 80 per cent in five years, and California's prisons are now so overcrowded that their population has reached 125 per cent of capacity.

The Committee's leaders accused the California Supreme Court of "flip-flopping" on certain cases on which the court's decision was changed after rehearing. But the Committee did not reveal the fact that *none of the three justices whom the Committee is trying to unseat was on the Court or even had been appointed when those decisions were made.* Nevertheless, the politicians used those cases against the justices who had nothing to do with deciding them.

These unfair political tactics must be exposed. Nothing could be more destructive to our democratic system, which depends on a judiciary that is independent of partisan politics and that has the courage to decide cases on the facts and the law, not to please the politicians.



NEWSRELEASE  
 SEAL THE STATE BAR OF CALIFORNIA  
 DIVISION OF COMMUNICATIONS  
 555 FRANKLIN STREET  
 SAN FRANCISCO, CALIFORNIA 94102

CONTACT: Mari Weaver  
 (916) 444-2018  
 (415) 561-8280

#### NEW STATE BAR LEADER VOWS TO DEFEND JUDICIAL INDEPENDENCE

SACRAMENTO, September 12 - Attorney Anthony Murray of Los Angeles today used the occasion of his swearing in as president of The State Bar of California to announce a statewide program to educate the public about the role of the judiciary and to defend California judges against political attack. In his remarks, which were interrupted by applause nine times, Murray criticized what he called "the idiotic cries of self-appointed vigilantes" who threaten to campaign against the election, retention or confirmation of judges for political reasons.

Declaring that the defense of the judiciary would be the highest priority of his term in office, Murray called upon the representatives of local bar associations assembled for the state bar's Annual Meeting and Conference of Delegates to join in a statewide project that will include public speeches and resolutions by local and state bar leaders. Murray said that the state bar will provide advice and sample materials to "maximize the effectiveness of the campaign."

"We must make it clear that the only legitimate basis for refusing to retain or for recalling a justice is a showing

of incapacity or misconduct in office," Murray said, explaining that the courts' role of reviewing the constitutionality of enactments of the legislature or the voters is, by definition, "antimajoritarian." "They are required to overturn the popular will if it conflicts with a higher law," the newly-installed head of the official organization of California's 75,000 attorneys said of the courts. "That is their absolute responsibility."

He said it was likely that attacks on the judiciary would be stepped up "in the weeks and months ahead" as the state Supreme Court may be called upon to consider challenges to the constitutionality of various provisions of Proposition 8, the so-called "Victims Bill of Rights" approved by the voters in June. Recently, the court upheld the measure as complying with the constitutional requirement that a ballot initiative embrace only one subject, but it left open the possibility of hearing future challenges to specific provisions of Proposition 8.

"Already, the political opportunists hail the court's Proposition 8 decision as a political victory, claiming that the decision represents a surrender to political pressure," said Murray. "We can be assured that they will now increase the pressure to try to keep the court in line as it meets the challenges ahead. Nothing could be more destructive to our legal system."

At a press conference following his speech, Murray said that other priorities of his one-year term as state bar president include improving conditions in California's prisons, raising the level of competence of the state's attorneys by instituting state bar certification of trial specialists and a Litigation Section of the state bar, and

increasing access to legal services for low-income Californians.

Predicting "a hemorrhage of violence comparable to Attica and New Mexico" in California's prisons, Murray, who recently participated in an inspection of several prisons by the Executive Committee of the state bar's Criminal Law Section, said, "Everything about the prisons is bad."

Murray, 45, is a partner in the Los Angeles law firm of Ball, Hunt, Hart, Brown and Baerwitz. A member of the American Academy of Trial Lawyers, Murray has served on the Board of Governors of the Long Beach Bar Association and chaired the state bar's Criminal Law Section. He also has been a member of the state bar's Disciplinary Board and served on the state bar's Commission on Judicial Nominees Evaluation.

A native Californian, Murray received his J.D. from Loyola University School of Law in 1964 and became a member of the bar in 1965.

That principle was established early in the development of this nation. Just 29 years after the Declaration of Independence, the principle was put to a major test. Let's take a minute to remember our past as we prepare for the future. The year was 1805, the year the Senate of the United States conducted a celebrated impeachment trial. The named accused was Samuel Chase, Associate Justice of the United States Supreme Court. The real accused was judicial independence.

Justice Chase was a Federalist on a Federalist-dominated court, but the Republicans held the political

power and wanted to purge the court of Federalists. They started with Justice Chase. Does that sound somewhat familiar? Except for the names, that story could be our story, in 1982. The presiding officer was Aaron Burr, Vice President of the United States. Justice Chase was defended by Luther Martin, the greatest trial lawyer of the time. One of the witnesses was John Marshall, Chief Justice of the United States.

The dilemma for the Republican politicians was the one that always confronts ambitious politicians who attack the courts for personal gain. They had no legally sufficient reason to remove Justice Chase. The law was against them. They wanted to impeach him as a first step in removing all the other Federalist justices, including Marshall; but Chase had not committed any high crimes or misdemeanors which would justify impeachment under the Constitution.

The solution was the one that has been adopted throughout history: forget the legal reasons; attack the judge's *opinions* and *philosophy*. The politicians did that, and went even further. The chief architect of the impeachment campaign, Senator William Branch Giles, boldly announced that *judicial independence itself* was intolerable; that the courts were nothing more than an arm of the executive and legislative branches; and that the Senate had the authority to remove a judge if he is "disagreeable in his office, or wrongheaded."

Senator Giles shamelessly declared, in words that are disturbingly familiar today, that:

"A removal by impeachment was nothing more than a declaration by Congress to this effect: you hold

dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better."

---

### INDEPENDENCE OF THE JUDICIARY

A Speech by Anthony Murray  
President of The State Bar of California  
at his Swearing-in Ceremony  
at the 1982 State Bar Annual Meeting  
Sunday, September 12, 1982

This is a day of great pride for me. I am proud to succeed Sam Williams, who has truly been one of our greatest presidents. May I ask you to join me now in acknowledging his outstanding work for our profession.

I am proud to stand here as a part of this great bar association: the largest state bar in the nation; the largest self-regulating agency in the world; the recognized leader among the bar associations in this country.

I am especially proud because the organized bar throughout history has repeatedly shown that it stands for principle, and that it can and will defend the great traditions that drive our legal system.

That is the lesson of history, but history is often a poor teacher. The philosopher George Santayana told us that "Those who cannot remember the past are condemned to repeat it." Today, in California, we have been condemned to repeat a part of our past. It's a sad chapter for lawyers, one that is repeated over and over again.

I refer to the recent attacks upon our courts. We can expect those attacks to increase in the weeks and months ahead. The Supreme Court's recent decision rejecting a preliminary challenge to Proposition 8, the so-called "Victims' Bill of Rights," was only an opening skirmish. The real war will soon be fought, when the court receives the onslaught of challenges to the specific provisions of Proposition 8.

Already, the court's opponents hail the Proposition 8 decision as a *political* victory, claiming that the decision represents a surrender to political pressure. We can be assured that they will now increase the pressure to try to keep the court in line as it meets the challenges ahead.

Nothing could be more destructive to our legal system. The genius of that system, and the part that the ignorant and ambitious find easiest to attack, is judicial independence: the notion that the courts must operate outside and independently of politics.

It was the good fortune of the nation that the Senate did not yield to the appeals of the political opportunists. It rose above partisanship. It rejected the sophistry that a judge can be removed because the politicians disagree with his judicial philosophy. The Senate declined to impeach Justice Chase, refusing to abandon the principle of judicial independence.

That was 1805. What have we learned about judicial independence since then? Sad to say, down through the 177 years since the Chase trial, we have been condemned to repeat that story, over and over again. In our own time we have witnessed the scandalous attempts to impeach our greatest Chief Justice, Earl Warren. In California, we



saw the politicians assault the great Traynor Supreme Court. And now we again suffer the hysterical, "soft-on-crime" rantings of the assailants of our own Supreme Court.

We hear of a candidate for national office, himself a lawyer, who threatens a recall of our Chief Justice if the Supreme Court dares to overturn Proposition 8; and he says the Chief Justice should be recalled *regardless of the grounds* on which the court might invalidate Proposition 8. Shades of the Chase trial. "Forget the law." "You hold dangerous opinions." "You are wrong-headed." "We want you job so we can give it to someone whom we decide is right-headed."

We hear the idiotic cries of the self-appointed vigilantes: the committee on law and order; the court watchers; the self-seeking prosecutors and lawyers who want to be judges; and every unscrupulous politician who thinks there is something in it for him if he gets in line to kick the courts which he sees as inert and defenseless. But the surprise is that our courts are not defenseless. They have the bar. They have always had the bar. They have us as the defenders of the courts. And we are defending them. From San Diego, to Los Angeles, to San Francisco, to Sacramento, the bar is rising to denounce these attacks.

It is a curious truth that the strength of our legal system is also its weakness. The great paradox is that the more the courts exercise independence from politics, the more they expose themselves to attacks based on politics.

Why does our system seem almost to invite attacks upon the courts by unscrupulous politicians? The answer

lies in the nature of the duties the system asks our courts to perform. We say to the courts, "This is our Constitution. We charge you to tell us what it means." The courts must reduce to concrete terms such sublime but ethereal phrases in the California Constitution as, "All people are by nature free and independent." The Court must give specific content and application to declarations that everyone has inalienable rights to "life," "liberty," "safety," to "happiness," and to "privacy." And if the courts translate the right to "happiness" into specific legal rights and duties, there will always be someone around who will say that "'happiness' doesn't mean that", so the judges who gave it that meaning should be cashiered, defeated at the polls.

That's part of the squeeze on the courts. The other part is that the courts are called upon to exercise the power of judicial review, the responsibility of deciding whether an enactment of the legislature or of the voters is constitutional. To discharge that role, the courts by definition must be antimajoritarian. They are required to overturn the popular will if it conflicts with a higher law. That is their absolute responsibility. Overturning the popular will is not popular. But in giving them that responsibility, the system casts the courts in a nearly suicidal position. The courts occupy the unenviable role of policeman for the system. We mistrust absolute, unreviewable democracy, and so we ask the courts to police the works of democracy. And when they do so they are accused of "flouting the will of the people." And around and around we go.

The bullies of our land are out to beat up on the courts, and California is not the only place where they are throwing their weight around. It seems that across the nation, wherever there is an election, the judges are called "soft on crime." In a recent editorial, the New York Times cited the spectacle of the two Republican candidates for governor, each trying to go one better in attacking New York's highest court. Said the Times, "With equal fervor, they vowed to appoint only 'tough-minded' jurists when the tender-hearted incumbents retire." The editorial concluded by proposing the only effective antidote to such poison: "Bar associations and lawyers had better prepare to defend the bench against the bullies."

In California there are many opportunities to gang up on the courts. We have retention elections for Supreme Court justices. We have recall petitions. And the same crusaders who use and manipulate these procedures as swords have invented another weapon that is far more dangerous. They call it a "Victims' Bill of Rights." This bomb will soon roll into the Supreme Court, and once again the system will call upon the court to defuse the bomb before it blows us apart.

Proposition 8 is a simplistic, almost childish, but extremely dangerous measure. It pretends to deal with the deep complexities of crime by throwing slogans at the problem. It piously declares that there is a "right to safe schools" and does nothing to make schools safe. The ultimate irony is that it leaves to the courts, the same courts that its sponsors revile so much, the job of making the schools safe. It tampers with the right to privacy, the

right to bail, the insanity defense, diminished capacity, admissible evidence, and a host of other diverse subjects.

A hail of new challenges to the effects of Proposition 8 will soon rain down upon the court: denial of bail; use of illegally-obtained evidence; prohibition of plea-bargaining; the prejudicial effect of evidence no longer excluded. And the justices are expected to deal with these issues and all the while to remain unaffected by all of the jeering and threatening; they must not allow the pressure to affect their ability to perform the awesome quantities of work that flood the court in greater amounts each year.

Last year, the Supreme Court disposed of 3,179 petitions for hearing; that's 265 a month, nearly nine petitions every day of the year. In addition, the court decided 114 cases on the merits, and 27 death penalty cases came to the court by automatic appeal.

And most astonishing of all, the court performs these prodigious tasks without the slightest suggestion that it is yielding to the pressure. Now it is time for the bar to do its part. We need concrete action and we need it now.

We must make clear that the only legitimate basis for refusing to retain or for recalling a justice is a showing of incapacity or misconduct in office. We must point out that even the loudest of the Supreme Court's opponents do not suggest that there is the slightest evidence of incapacity or misconduct in office. We must make it clear that judges cannot be removed because the politicians disagree with their judicial philosophies or with specific opinions. Any other rule would replace judges with pollsters. Courts would never render a decision without first



raising a finger to the political wind. That was not our system when this nation was formed, and we won't allow it to become our system today.

In the next few days I will be proposing a specific plan of action:

- The plan will enlist the help of the local bars to speak out and to describe the need for an independent judiciary.

- It will provide specific materials to the local bars to help develop speeches, speakers' bureaus, media contacts, and other programs without delay.

I call upon you as leaders of our profession to join the long and honorable tradition of the bar and to rise in defense of our courts. I ask you to mobilize support in your communities, and to denounce these political mercenaries who are trying to pull down our legal system. The preservation of our independent judiciary can be your legacy for the future of the law. That's what the bar is all about. And that is why I am so deeply honored to be a part of it.

---

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
ANTHONY T. CASO  
Pacific Legal Foundation  
455 Capitol Mall, Suite 600  
Sacramento, California 95814  
Telephone: (916) 444-0154

Attorneys for Petitioners  
and Plaintiffs

IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	
Petitioners and Plaintiffs,	)	Civ. No. 307168
v.	)	
STATE BAR OF CALIFORNIA, a	)	AMENDMENT
public corporation; ANTHONY M.	)	TO PETITION
MURRAY; PATRICIA GREENE;	)	FOR WRIT OF
GIRT K. HIRSCHBERG; LELAND R.	)	M A N D A T E
SELNA, JR.; GEOFFREY VAN	)	A N D C O M -
LOUKS; THOMAS W. ERES; JOHN	)	P L A I N T F O R
J. COSTANZO; GEORGE W.	)	D E C L A R A -
COUCH, III; BURKE M. CRITCH-	)	T O R Y A N D
FIELD; THOMAS R. DAVIS; DIXON	)	I N J U N C T I V E
Q. DERN; RUTH CHURCH GUPTA;	)	R E L I E F
DALE E. HANST; LEONARD HERR;	)	
ROBERT A. HINE; PHYLLIS M. HIX;	)	
MARTA MACIAS; PHILLIP	)	
SCHAFER; CRAIG A. SILBERMAN;	)	
DANIEL J. TOBIN; JAMES D.	)	
WARD; and JOON HEE RHO,	)	
Respondents and Defendants.	)	

---



There being no answer or other responsive pleading of respondents and defendants yet on file in this action, petitioners and plaintiffs hereby amend their Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief as follows:

1. The caption on Page No. 1, Line Nos. 11-21, is amended to read:

EDDIE KELLER; RAYMOND )	
BROSTERHOUS; DAN M. KINTER; )	
DAVID LAMPE; GARRETT BEAU- )	Civ. No. 307168
MONT; CHRISTOPHER L. FAIR- )	
CHILD; JOHN A. GORDNIER; )	
CHRISTOPHER N. HEARD; )	
LEONARD C. HOAR, JR.; J. )	
ROBERT JIBSON; CHARLES P. JUST; )	
DAROLD D. PIEPER; THOMAS )	
HUNTER RUSSELL; NANCY L. )	
SWEET; MICHAEL J. WEIN- )	
BERGER; DAVID E. WHIT- )	
TINGTON; AND THOMAS R. )	
YANGER, )	
Petitioners and Plaintiffs, )	
v. )	

STATE BAR OF CALIFORNIA, a )	
public corporation; ANTHONY M. )	
MURRAY; PATRICIA GREENE; )	
GIRT K. HIRSCHBERG, LELAND R. )	
SELNA, JR.; GEOFFREY VAN )	
LOUKS; THOMAS W. ERES; JOHN )	
J. COSTANZO; GEORGE W. )	
COUCH, III; BURKE M. CRITCH- )	
FIELD; THOMAS R. DAVIS; DIXON )	
Q. DERN; RUTH CHURCH GUPTA; )	
DALE E. HANST; LEONARD HERR; )	
ROBERT A. HINE; PHYLLIS M. HIX; )	
MARTA MACIAS; PHILLIP )	
SCHAFER; CRAIG A. SILBERMAN; )	
DANIEL J. TOBIN; JAMES D. )	
WARD; AND JOON HEE RHO, )	
Respondents and Defendants. )	

2. Paragraph No. 2, on Page No. 2, Line Nos. 10-14, is amended to read:

"2. Petitioners and plaintiffs, Eddie Keller, Raymond Brosterhous, Dan M. Kinter, David Lampe, Garrett Beaumont, Christopher L. Fairchild, John A. Gordnier, Christopher N. Heard, Leonard C. Hoar, Jr., J. Robert Jibson, Charles P. Just, Darold D. Pieper, Thomas Hunter Russell, Nancy L. Sweet, Michael J. Weinberger, David E. Whittington, and Thomas R. Yanger are members in good standing of the State Bar of California and as such each is required to pay, has paid, and will continue to pay dues to the State Bar of California as required by law."

DATED: November 18, 1982.

Respectfully submitted,

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
ANTHONY T. CASO

By /s/ Anthony T. Caso  
ANTHONY T. CASO

Attorneys for Petitioners  
and Plaintiffs

---

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
ANTHONY T. CASO  
Pacific Legal Foundation  
455 Capitol Mall, Suite 600  
Sacramento, California 95814  
Telephone: (916) 444-0154

Attorneys for Petitioners  
and Plaintiffs

IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	
Petitioners and Plaintiffs,	)	Civ. No. 307168
	)	
v.	)	
STATE BAR OF CALIFORNIA, a	)	S E C O N D
public corporation; ANTHONY M.	)	AMENDMENT
MURRAY; PATRICIA GREENE;	)	TO PETITION
GIRT K. HIRSCHBERG; LELAND R.	)	FOR WRIT OF
SELNA, JR.; GEOFFREY VAN	)	M A N D A T E
LOUKS; THOMAS W. ERES; JOHN	)	A N D C O M -
J. COSTANZO; GEORGE W.	)	P L A I N T F O R
COUCH, III; BURKE M. CRITCH-	)	D E C L A R A -
FIELD; THOMAS R. DAVIS; DIXON	)	T O R Y A N D
Q. DERN; RUTH CHURCH GUPTA;	)	I N J U N C T I V E
DALE E. HANST; LEONARD HERR;	)	R E L I E F
ROBERT A. HINE; PHYLLIS M. HIX;	)	
MARTA MACIAS; PHILLIP	)	
SCHAFER; CRAIG A. SILBERMAN;	)	
DANIEL J. TOBIN; JAMES D.	)	
WARD; and JOON HEE RHO,	)	
Respondents and Defendants.	)	

---

There being no answer or other responsive pleading of respondents and defendants yet on file in this action, petitioners and plaintiffs hereby amend their Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief as follows:

1. The caption on Page No. 1, Line Nos. 11-21, is amended to read:

EDDIE KELLER; RAYMOND )	
BROSTERHOUS; DAN M. KINTER; )	
DAVID LAMPE; GARRETT BEAU- )	Civ. No. 307168
MONT; CHRISTOPHER L. FAIR- )	
CHILD; JOHN A. GORDNIER; )	
CHRISTOPHER N. HEARD; )	
LEONARD C. HOAR, JR.; J. )	
ROBERT JIBSON; CHARLES P. JUST; )	
DAROLD D. PIEPER; THOMAS )	
HUNTER RUSSELL; NANCY L. )	
SWEET; MICHAEL J. WEIN- )	
BERGER; DAVID E. WHIT- )	
TINGTON; THOMAS R. YANGER; )	
WARD A. CAMPBELL; DONALD C. )	
MEANEY; ASSEMBLYMAN )	
PATRICK J. NOLAN; and A. WELLS )	
PETERSEN, )	
Petitioners and Plaintiffs, )	
v. )	

STATE BAR OF CALIFORNIA, a )
public corporation; ANTHONY M. )
MURRAY; PATRICIA GREENE; )
GIRT K. HIRSCHBERG, LELAND R. )
SELNA, JR.; GEOFFREY VAN )
LOUKS; THOMAS W. ERES; JOHN )
J. COSTANZO; GEORGE W. )
COUCH, III; BURKE M. CRITCH- )
FIELD; THOMAS R. DAVIS; DIXON )
Q. DERN; RUTH CHURCH GUPTA; )
DALE E. HANST; LEONARD HERR; )
ROBERT A. HINE; PHYLLIS M. HIX; )
MARTA MACIAS; PHILLIP )
SCHAFER; CRAIG A. SILBERMAN; )
DANIEL J. TOBIN; JAMES D. )
WARD; AND JOON HEE RHO, )
Respondents and Defendants. )

Paragraph No. 2, on Page No. 2, Line Nos. 10-14, is amended to read:

"2. Petitioners and plaintiffs, Eddie Keller, Raymond Brosterhous, Dan M. Kinter, David Lampe, Garrett Beaumont, Christopher L. Fairchild, John A. Gordinier, Christopher N. Heard, Leonard C. Hoar, Jr., J. Robert Jibson, Charles P. Just, Darold D. Pieper, Thomas Hunter Russell, Nancy L. Sweet, Michael J. Weinberger, David E. Whittington, Thomas R. Yanger, Ward A. Campbell, Donald C. Meaney, Assemblyman Patrick J. Nolan, and A. Wells Petersen are members in good standing of the State Bar of California and as such each is required to pay, has paid, and will continue to pay dues to the State Bar of California as required by law."



DATED: January 13, 1983.

Respectfully submitted,

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
ANTHONY T. CASO

By /s/ Anthony T. Caso  
ANTHONY T. CASO

Attorneys for Petitioners  
and Plaintiffs

---

HUFSTEDLER, MILLER, CARLSON & BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

700 South Flower Street

Sixteenth Floor

Los Angeles, California 90017

Telephone: (213) 629-4200

HERBERT M. ROSENTHAL

TRUIT A. RACHEY, JR.

MAGDALENE Y. O'ROURKE

555 Franklin Street

San Francisco, California 94102

Telephone: (415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,

Petitioners and Plaintiffs,

v.

STATE BAR OF CALIFORNIA, a public  
corporation; ANTHONY M. MURRAY;  
PATRICIA GREENE; GIRT K.  
HIRSCHBERG, LELAND R. SELNA,  
JR.; GEOFFREY VAN LOUKS;  
THOMAS W. ERES; JOHN J. COS-  
TANZO; GEORGE W. COUCH, III;  
BURKE M. CRITCHFIELD; THOMAS  
R. DAVIS; DIXON Q. DERN; RUTH  
CHURCH GUPTA; DALE E. HANST;  
LEONARD HERR; ROBERT A. HINE;  
PHYLLIS M. HIX; MARTA MACIAS;  
PHILLIP SCHAFER; CRAIG A. SIL-  
BERMAN; DANIEL J. TOBIN; JAMES  
D. WARD; AND JOON HEE RHO,

Respondents and Defendants.

---

) Civ. No. 307168

) ANSWER

) (Endorsed Jan.  
21, 1983)

) J.A. Simpson,  
Clerk by J. King-  
sley, Deputy

Defendants State Bar of California, Anthony M. Murray, Patricia Greene, Girt K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Louks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. David, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward, and Joon Hee Rho, for themselves and no other parties, answer the Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, as amended, as follows:

1. Defendants admit the allegations of Paragraph 1 of the Complaint, except the defendants deny that any expenditures are being made for political and ideological purposes in violation of petitioners' and plaintiffs' constitutional rights to freedom of speech and association.

2. Defendants have no information or belief sufficient to enable them to admit or deny the allegations of Paragraph 2 of the Complaint and on that basis deny, generally and specifically, each and every allegation thereof.

3. Defendants admit the allegations of Paragraph 3 of the Complaint.

4. Defendants admit the allegations of Paragraph 4 of the Complaint.

5. In response to the allegations of Paragraph 5 of the Complaint, defendants allege that the provisions of the California Constitution, and the Business and Professions Code, speak for themselves, and that basic membership dues for the State Bar are as set by the legislature. Except as so alleged, defendants deny, generally and

specifically, each and every allegation of Paragraph 5 of the Complaint.

6. Defendants admit that the State Bar of California has expended revenues for lobbying, the submission of briefs *amicus curiae*, financing meetings for the Conference of Delegates, publicizing the speeches of the President of the State Bar, and financing a public information project on the judiciary. Except as so admitted, defendants deny, generally and specifically, each and every allegation of Paragraph 6 of the Complaint.

7. Defendants have no information or belief sufficient to enable them to respond to the allegations of Paragraph 7 of the Complaint, and on that basis deny, generally and specifically, each and every allegation of Paragraph 7.

8. Defendants deny generally and specifically each and every allegation of Paragraph 8 of the Complaint.

9. Defendants deny generally and specifically each and every allegation of Paragraph 9 of the Complaint.

10. Defendants deny generally and specifically each and every allegation of Paragraph 10 of the Complaint. Defendants further deny, generally and specifically, that petitioners and plaintiffs are entitled to the remedies sought herein, or to any remedy at all.

#### FIRST FURTHER AND SEPARATE DEFENSE

11. Plaintiffs have failed to state a cause of action upon which relief can be granted.

*SECOND FURTHER AND SEPARATE DEFENSE*

12. Plaintiffs are guilty of laches, and are thus not entitled to equitable relief.

*THIRD FURTHER AND SEPARATE DEFENSE*

13. Plaintiffs come before the Court with unclean hands and are not entitled to any equitable relief.

*FOURTH FURTHER AND SEPARATE DEFENSE*

14. Plaintiffs have waived and are estopped from claiming any rights to equitable relief.

*FIFTH FURTHER AND SEPARATE DEFENSE*

15. Defendants' actions are privileged and protected by the laws and constitutions of the State of California and the United States.

WHEREFORE, these answering defendants pray that:

1. The relief sought by the Petition and Complaint be denied;
2. Defendants be permitted to recover from plaintiffs their costs of this suit, including their reasonable attorneys' fees, and
3. The Court grant defendants such other and further relief as it deems just and proper.

DATED: January 20, 1983.

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY

HERBERT M. ROSENTHAL  
TRUIT A. RACHEY, JR.  
MAGDALENE Y. O'ROURKE

By/s/ Mary E. Healy  
Mary E. Healy  
Attorneys for Defendants

---



HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
 ROBERT S. THOMPSON  
 STANLEY H. WILLIAMS  
 LAURIE D. ZELON  
 MARY E. HEALY  
 700 South Flower Street  
 Sixteenth Floor  
 Los Angeles, California 90017  
 Telephone: (213) 629-4200

HERBERT M. ROSENTHAL  
 TRUIT A. RACHEY, JR.  
 MAGDALENE Y. O'ROURKE  
 555 Franklin Street  
 San Francisco, California 94102  
 Telephone: (415) 569-8200  
 Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	) Civ. NO. 307168
Petitioners and Plaintiffs,	)
v.	) MEMORAN-
STATE BAR OF CALIFORNIA, a public	) D U M O F
corporation; ANTHONY M. MURRAY;	) POINTS AND
PATRICIA GREENE; GIRT K.	) AUTHORITIES
HIRSCHBERG, LELAND R. SELNA,	) IN OPPOSITION
JR.; GEOFFREY VAN LOUKS;	) TO MOTION
THOMAS W. ERES; JOHN J. COS-	) FOR PRELIMI-
TANZO; GEORGE W. COUCH, III;	) NARY INJUNC-
BURKE M. CRITCHFIELD; THOMAS	) TION
R. DAVIS; DIXON Q. DERN; RUTH	) (Endorsed Jan.
CHURCH GUPTA; DALE E. HANST;	) 21, 1983)
LEONARD HERR; ROBERT A. HINE;	) J.A. Simpson,
PHYLLIS M. HIX; MARTA MACIAS;	) Clerk by B.J.
PHILLIP SCHAFER; CRAIG A. SIL-	) Straass, Deputy
BERMAN; DANIEL J. TOBIN; JAMES	) DATE:
D. WARD; AND JOON HEE RHO,	) January 28, 1983
Respondents and Defendants.	) TIME: 9:00 A.M.
	) DEPT.: 16

# I. INTRODUCTION

This Memorandum of Points and Authorities is submitted on behalf of defendants State Bar of California, Anthony M. Murray, Patricia Greene, Girt K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Louks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. Davis, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward and Joon Hee Rho. Defendants respectfully submit that this is an inappropriate case for preliminary injunction, that plaintiffs have failed to make a sufficient showing to support a preliminary injunction, and that under the circumstances of this case such relief is unavailable in any event.

## A. Preliminary Statement

The State Bar of California has existed since 1927. It is a creature of the State Constitution as implemented by legislative enactments. California statutes expressly authorize the State Bar to engage in the following range of activities: advancement of the science of jurisprudence; improvement of administration of justice; promotion of relations of the bar with the public; advancement of the professional interest of the members of the State Bar and performance of actions necessary to the administration and purposes of the State Bar.

The State Legislature closely supervises the scope of activity of the State Bar. The Legislature reviews the activities of the State Bar each year when authorizing annual "dues" payable by lawyers for the privilege of

practicing law in this State. The legislative consideration of annual State Bar "dues bills" does not occur in a vacuum, the State Bar presents the activities planned for the year to the Legislature.\* In enacting the annual "dues bill", the Legislature implicitly authorizes the State Bar activity described in the presentation.

The most detailed presentation by the State Bar to the Legislature about its activity occurred in 1981. (Exhibit 1.) This presentation included over thirty individual activities in some ten categories, excluding administrative activities. Although less detailed, subsequent and prior presentations likewise described categories of activities. These categories (and some individual activities within them) include: enhancing professional standards and competency; supporting legal services delivery and access; educating the public; providing member services and improving the administration of justice, news media relations including capitalizing "on the news potential of the annual" meeting and "work with the President to take advantage of the news media's natural interest in what the bar has to say - through suggesting speech themes; preparing speech text in advance. . . . and publicizing his views through news releases, press conferences and editorial board meetings . . . ." (Exhibit 1, p. 131), public education programs (*id.*, *id.*, pp. 133, 159-164), legal

---

\* Exhibits 1 and 2 to this Memorandum are examples of these presentations. All exhibits to this Memorandum are submitted under separate cover and filed concurrently with this Memorandum. Declarations in support of this Memorandum will be filed separately with the Court.

services and law reform including "presentation of legislative program (*id.*, 9, 148), and judicial system reform and evaluation of judicial nominees (Exhibit 2, p. 11 and 12).

In their motion plaintiffs seek a preliminary injunction that if granted would - without a trial on the merits - abort a major part of long performed functions of the State Bar expressly mandated and implicitly approved by the Legislature. Plaintiffs ask this honorable Court for this provisional relief even though: (1) to grant the relief sought would massively disrupt the *status quo* before a trial on the merits; (2) plaintiffs would suffer no irreparable injury if the preliminary injunction is denied; (3) the hardship to the State Bar were the preliminary injunction granted and its activities aborted would be great indeed, whereas plaintiffs would suffer little or none if the injunction is denied; and (4) the prospect that plaintiffs will prevail on the merits of the case is extremely unlikely.

Controlling California authority including *Stanson v. Mott*, 17 Cal.3d 206 (1976), *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139 (1974) *cert. denied* 333 U.S. 876 (1948), and *Lehane v. City & County of San Francisco*, 30 Cal.App.3d 1051 (1972) supports the position of defendants, as does legislative history. In support of their request for injunctive relief plaintiffs rely upon one decision of one federal district court judge in New Mexico. In view of *Auto Equity Sales Inc. v. Superior Court*, 57 Cal.2d 450 (1962) this decision, *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M. 1982) would not be binding upon this honorable court even if that case were indistinguishable from the case at bar and correctly decided. It is neither. Plaintiffs



have failed utterly to demonstrate that the integrated bar of New Mexico, a creature of court rule, is similar to the State Bar of California, which is created by the California Constitution and implemented by statutes, and is a governmental entity with broad authority. As described in *Arrow*, the integrated bar of New Mexico sought to justify the activity disallowed by the district court judge solely on a general right and obligation of lawyers. Finally, the reasoning of *Arrow* contradicts the reasoning of the Ninth Circuit in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, etc.*, 685 F.2d 1065 (9th Cir. 1982). The injunctive relief granted in *Arrow* is also contrary to the United States Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976), and the California Supreme Court's decision in *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139 (1947).

For these reasons, defendants respectfully submit that plaintiffs' Motion for Preliminary Injunction should be denied.

#### B. Status of This Action

This action has been filed by twenty-one individual members of the State Bar of California, who seek to enjoin a broad range of activities by the State Bar to which they apparently object. According to plaintiffs, the use of the fees they must pay as a result of the legislative authorization of the State Bar as an integrated bar, for activities they disapprove of, violates their First Amendment rights. Plaintiffs also seek preliminarily to enjoin the State Bar from proceeding with its activities outside of the area of admissions, discipline, and regulation, even though

they have failed to present any showing that these activities, or any activities, infringe their constitutional rights. Moreover, the authority upon which plaintiffs rely does not support the relief they request even if their factual showing were adequate.

A temporary restraining order and order to show cause was entered on October 26, 1982. Defendants were ordered to show cause why they should not be enjoined during the pendency of the action from using the revenue from State Bar dues, or the name of the State Bar, "to promote any particular ideologies regarding judicial retention elections or other elections." The Court further ordered that, pending the hearing, defendants were restrained from using revenue derived from the named plaintiffs' State Bar dues to "promote any particular criteria regarding the evaluation of judges and judicial retention elections."

This order, narrower than the order of preliminary injunction plaintiffs seek, has been superseded by an order continuing the hearing from November 29, 1982, to January 28, 1983. Pursuant to stipulation, pending the hearing the defendants have deposited a sum equal to the mandatory State Bar dues of all the plaintiffs named in the complaint as of December 2, 1982 in a trust account.\* Thus, at the present time, no funds of the Plaintiffs are being used for any purpose at all.

---

\* The complaint was amended again, on January 13, 1983, after the Court Order, to add additional plaintiffs.



### C. *The History Of The State Bar And Its Activities*

The State Bar was created in 1927 by the State Bar Act. Bus. and Prof. Code §6000 *et seq.* Throughout its history, the State Bar has remained subject to the provisions of this statute. In 1960, the status of the State Bar was altered when the voters approved a ballot proposition making the State Bar a constitutional entity. A similar vote in 1966 maintained this status.

The creation of the State Bar in 1927 was in part prompted by concerns about inadequate professional standards and competence and by widespread recognition of the need for assistance in legal reform and improvement of judicial administration. Reference to the records of the State Bar shows that the State Bar immediately began activities to address these concerns and that many of the programs begun by the State Bar in its early years have lasted in one form or another over the fifty years in which the State Bar has been in existence. For example, even in the earliest years of the Bar, and throughout its history, there have been programs to improve delivery of legal services to the poor, to promote reform in procedural and substantive areas of law, and to educate the public about issues affecting the State Bar.

With regard to the issues raised in this lawsuit, State Bar records show that the types of activities challenged by plaintiffs here have been part of State Bar programs for many years. For example, from its inception, the Bar organized sections of members to study and propose legal reform. One of the areas addressed at that time was judicial selection and conduct. In the 1930's, the State Bar was instrumental in gaining adoption of standards for

judicial selection in California. More recently the Bar has assisted in programs of judicial evaluation. Thus, activities to maintain the independence and integrity of the judiciary are not new to the State Bar.

Similarly, legislative activity is not new to the State Bar. One of the most effective ways in which the State Bar can fulfill its obligations to advance the science of jurisprudence and to improve administration of justice is to suggest and promote legislation. In the early years of the Bar, members of sections studying potential legal reform were encouraged to lobby for reform. The members of the Board of Governors and Secretary of the State Bar also lobbied for adoption of legislation recommended by Bar sections.

Programs to encourage participation of State Bar members in State Bar activities and programs to obtain the input of State Bar Members in decisions made by that organization, have also been of long standing in the State Bar. In fact, the predecessor program to the Conference of Delegates began in the 1930's.

These are just a few examples of how the categories of work of the State Bar have since its beginnings remained relatively constant. These examples also underscore the fact that the activities challenged by petitioners are long standing practices of the State Bar. The Bar has historically and continues to play a significant role in providing the legislative and executive branches with

information and assistance in areas of the particular expertise.\*

## II. THIS IS NOT AN APPROPRIATE CASE FOR A PRELIMINARY INJUNCTION

A preliminary injunction is a remedy appropriate only in limited circumstances. Absent a strong showing by the plaintiff, it should be denied. It is a remedy within the discretion of the court, and because of the severity of the remedy, such discretion is to be exercised with caution. See 2 Witkin, *California Procedure*, Provisional Remedies § 78 (2d ed. 1970).

The Supreme Court has defined the factors to be considered by the trial court in exercising this discretion:

1. The decision is not an adjudication upon the merits, but a determination, based on a balance of the respective equities, that defendant should or should not be restrained;
2. The purpose is the preservation of the *status quo* until the final determination on the merits;
3. A balance is to be drawn based on relative hardship to the parties, and the reasonable probability of plaintiff's success on the merits and;

---

\* A detailed discussion of the history of the State Bar and its activities is included in the Declaration of Magdalene Y. O'Rourke filed in support of this Memorandum. That Declaration and review of relevant history support the points made in this summary and demonstrates that plaintiffs are in fact challenging activities that have been the *status quo* for fifty years.

4. Any injunction issued may not be so uncertain or ambiguous that defendant cannot determine what actions are proscribed. *Continental Baking Co. v. Katz*, 68 Cal.2d 512, 528-29 (1968).

In applying these tests, this court should exercise its discretion to deny the preliminary injunctive relief plaintiffs seek. The *status quo* is precisely that which plaintiffs seek to upset by their request for preliminary injunction. Hardship to the State Bar and to the people of the State of California would be far greater than any hardship claimed by plaintiffs\*; and plaintiffs' success on the merits is extremely improbable.

### A. The Relief Requested Would Disrupt The Status Quo

The activities which plaintiffs seek preliminarily to enjoin are precisely those activities which the State Bar has engaged in since its inception in 1927. Plaintiffs obviously do not seek to preserve the *status quo*, for the status they seek to impose before this case is tried has never existed.\*\* This is inappropriate. *KGB, Inc. v. Giannoulas*, 104 Cal.App.3d 844, 859 (1980).

In fact, what plaintiffs actually seek to obtain via a preliminary injunction is a massive change in the entire balance of activities carried on by the State Bar, without

---

\* In fact, the hardship to plaintiffs would be *de minimus*. See Exhibit B to the Declaration of Mary G. Wailes filed in support hereof.

\*\* See Declaration of Magdalene Y. O'Rourke.



making any detailed showing, and without giving this court an opportunity to consider the complex factual circumstances at issue here. Such an order would be wholly inconsistent with the caution mandated on a motion for preliminary injunction.

B. *The Balance Of Hardships Favors The State Bar*

In considering whether to grant preliminary relief, the court should balance the relative hardships between the parties:

"In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion [citation] and it must then be exercised in favor of that party [citation]." *Continental Baking Co. v. Katz, supra*, 68 Cal.2d at 528, quoting *Family Record, Inc., v. Mitchell*, 172 Cal.App.2d 235, 242 (1959).

See also 2 Witkin, *California Procedure*, Provisional Remedies § 80 (2d ed. 1970).

1. *The Greater Burden Would Be Placed On The State Bar*

In applying this principle, courts have looked at the actual factual circumstances to determine where the greater burden will lie. Thus, in *State Board of Barber Examiners v. Star*, 8 Cal.App.3d 736 (1970), for example, a preliminary injunction was properly denied because the grant of that injunction would have resulted in great hardship to the defendant by forcing it to discontinue the practices in which it was engaged. Conversely, an injunction was upheld in *Associated California Loggers, Inc. v.*

*Kinder*, 79 Cal.App.3d 34 (1978), because the action enjoined would have resulted in termination of an "elaborate" program resulting in discharge of employees and economic loss, whereas the issuance of the injunction threatened no serious harm to the other party. 79 Cal.App.3d at 39. In this case, the hardship can be avoided by denying the requested injunction. As in *Star*, the grant of preliminary injunctive relief here would result in the complete cessation of a myriad of ongoing programs established by the State Bar. It would disrupt contracts and ongoing programs that could not be reconstituted easily if their continuity were broken.\*

2. *The Public Interest Would Be Adversely Affected By The Grant Of Relief*

In performing the balancing test, the court must also consider whether the issuance of the injunction would adversely affect the public interest. See, e.g., *Socialist Workers' 1974 Calif. Campaign Committee v. Brown*, 53 Cal.App.3d 879 (1975).

"In balancing the injury to plaintiff's First Amendment rights which would result from denial of a preliminary injunction, as against the injury to the people of California which would result from the granting of the injunction, the trial court properly could have concluded (and doubtless did conclude) that the latter injury would be greater. '[W]here an injunction is

---

\* See Declaration of Mary G. Wailes for a discussion of the hardships and disruption an injunction would cause to the State Bar.



asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until the final determination of the rights of the parties, though the postponement may be burdensome to plaintiff. . . . "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." " 53 Cal.App.3d at 889, quoting *Yakus v. United States*, 321 U.S. 414, 440-441 (1944).

The State Bar was created to, and does serve, the interest of the people of the State of California. The disruption, cessation, and destruction of its programs which would result from the grant of preliminary injunctive relief would thus be an overwhelming burden on the people of the State of California, which cannot be supported.

Although plaintiffs assert that they are, *per se*, irreparably injured by the damage to their First Amendment rights, such a possibility was explicitly considered, and rejected, in the *Brown* case. Although the State Bar submits that plaintiffs' rights are not injured, it submits also that, assuming some quantum of harm to plaintiffs, *Brown* requires that the rights of the State Bar and of the people of the State of California be given greater weight.

### III. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS

#### A. California Law Permits a Public Entity, Such as the State Bar, to Engage in the Type of Activities in Which the State Bar Engages

##### 1. The State Bar is a Public Entity.

Article VI, §9, of the California Constitution establishes the State Bar of California as a public corporation.

The parallel legislative enactment, establishing the State Bar as a public corporation, and enumerating its powers, is the State Bar Act, Bus. & Prof. Code §6000 *et seq.* The California Supreme Court upheld the constitutionality of the State Bar Act, and the establishment of the State Bar as a public corporation, in *State Bar of California v. Superior Court*, 207 Cal. 323 (1929).

Public corporations constitute public entities. See *Service Employees Int'l Union Local No. 22 v. Roseville Community Hospital*, 24 Cal.App.3d 400, 407 (1972); *Bettencourt v. Industrial Acc. Co.*, 175 Cal. 559, 561 (1917). Like other public entities, the State Bar was created to serve governmental purposes and was accordingly vested with governmental powers. It is charged with the duty of regulating the profession and practice of law, a subject which "is essentially . . . a matter of public interest and concern. . . ." *State Bar of California v. Superior Court*, *supra*, 207 Cal. at 331.

Because the State Bar is a public entity, its property is exempt from taxation. As the Legislature has declared, such property is "held for essential public and governmental purposes in the judicial branch of the government. . . ." Bus. & Prof. Code §6008. The members of the Board of Governors are considered to be public officers acting under oath. *Chronicle Publishing Co. v. Superior Court*, 54 Cal.2d 548, 566 (1960). These governmental powers, purposes, and attributes demonstrate clearly that the State Bar is a public corporation in fact as well as in theory, and that it is dedicated to public, not private ends. See *State Bar of California v. Superior Court*, *supra* 207 Cal. at 330-32. Moreover, as a matter of general policy, public corporations are deemed to be public entities. See Govt.

Code §53050; Govt. Code § 811.2; Evid. Code § 200; *Rhyne v. Municipal Court*, 113 Cal.App.3d 807 (1980).

Thus, the State Bar, a creature of California constitutional and statutory law, is, as a matter of California law, a public entity. Specific standards have been developed in California defining the range of activities in which public agencies may properly engage. As demonstrated below, those standards clearly authorize the State Bar to engage in the full range of activities challenged in this lawsuit.

2. *Public Entity Authority Is Tested By The Implicit and Explicit Powers Granted To The Agency By The Constitution And Legislative Action*

The powers of public agencies in California were described at length in *Stanson v. Mott*, 17 Cal.3d 206 (1976). In that case, a taxpayer challenged the expenditure of funds by the State Department of Parks & Recreation to promote the passage of a ballot proposition. In confirming the authority of the Department to expend funds for lobbying and public information related to ballot propositions, the court first examined the scope of the authorization given to the agency to expend funds. This analysis was required by "the general principle" that expenditures by an administrative official are proper only "insofar as they are authorized, explicitly or implicitly, by legislative enactment." 17 Cal.3d at 213. In determining whether the challenged activity was proper, the court looked to the various legislative authorizations pertaining to the department.

Various opinions of the Attorney General of California have applied this same analysis permit state agencies

and public entities to expend public funds if the expenditure is within the scope of their legislative authorization. See, e.g., 58 Ops. Cal. Atty. Gen. 29 (1975); 51 Ops. Cal. Atty. Gen. 190 (1968); 42 Ops. Cal. Atty. Gen. 25 (1963); 35 Ops. Cal. Atty. Gen. 112 (1960).

Like other California governmental agencies, the limits of the State Bar must be established by reference to the authorization given to the State Bar by the legislature and the people of the State of California. In the case of the State Bar this authorization comes from both the constitutional enactment of its existence and the legislation directing it. Like any other public corporation, the State Bar:

"[D]erives its powers from the statute under which it is created and acts, and from such other statutes as may have been enacted by the legislature granting it additional powers or limiting those already granted." *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318, 326 (1927).

3. *The Legislative Authority Explicitly and Implicitly Authorizes the Full Scope of Current State Bar Activity*

a. *The Specific Authorization is Broad*

The legislative authorization for the California State Bar is both clear and broad. Among other things, the State Bar is empowered to "Do all . . . acts . . . necessary or expedient for the administration of its affairs or the attainment of its purposes." Bus. & Prof. Code §6001(g). The Board of Governors of the State Bar is likewise authorized to "make appropriations and disbursements from the funds of the State Bar to pay all necessary expenses



for effectuating the purposes of this chapter." Bus. & Prof. Code §6028(a). Finally,

"The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." Bus. & Prof. Code §6031.

Plaintiffs cannot show that any of the challenged activities of the State Bar are outside of the scope of its authorization. Plaintiffs rather attempt to enjoin State Bar activity by claiming that, because they may disagree with some or all of the positions of the State Bar, the State Bar may not use their funds to engage in such activities.\*

b. *The Activities of the State Bar Have Been Specifically Approved By The Legislature And The Voters*

The State Bar has engaged in the activities plaintiffs challenge since its creation. The Legislature has scrutinized these activities annually in conjunction with its approval of the State Bar's dues bill. Thus, with full knowledge of these activities, the Legislature and the people of California have maintained the State Bar Act in effect. In determining whether the challenged activities are appropriate and are within the scope of the State

---

\* Plaintiffs have not even described which particular positions of the State Bar they actually disagree with. Defendants are therefore unable to define for the Court what specific problems plaintiffs want to address.

Bar's proper functions as a state agency, this Court should give great weight to this consistent legislative support of the activities of the State Bar.

As shown in the Declaration of Magdalene Y. O'Rourke in support of this Memorandum, sets forth some of the reasons for the original enactment. The intent of the Legislature in enacting the State Bar Act is also of great import in determining the scope of the State Bar's powers.

"It is well settled that in construing statutes the Court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. In the course of this procedure the Court must take into account a variety of factors, such as the context of the legislation, its objectives, the evils to be remedied, and public policy . . . . The cases are no less emphatic that contemporaneous constructions of the legislation may also be considered." *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.*, 59 Cal.App.3d 959, 973 (1976) (citations omitted).

See also *Alford v. Pierno*, 27 Cal.App.3d 682, 688 (1972).

Administrative construction of a statute and administrative practice are likewise entitled to great weight in ascertaining the meaning of the Legislature's actions. *English v. County of Alameda*, 70 Cal.App.3d 226, 240 (1977). Thus, the actions of the Legislature, both in reenacting the State Bar Act, and in approving the Bar's activities every year in the enacting the dues bill, are entitled to be weighed heavily in this Court's determination of the appropriate scope of the State Bar's authority. The State Bar's annual presentation in conjunction with its dues bill is explicit evidence of the Legislature's acute



awareness of its activities. Plaintiffs simply have no basis to argue that the challenged activities are beyond the scope of the intended authorization of the State Bar.

Further, in 1960 and in 1966 the electors of the State of California enacted constitutional propositions to establish and maintain the State Bar in the Constitution as a constitutional agency. In both elections the voters' approved the State Bar's status as a constitutional entity. The material submitted to the voters in these elections in support of, and in opposition to, the ballot propositions is contained in Exhibits 8 and 9 filed with this Memorandum. These materials are important in ascertaining the intent of the electorate (*see Diamond Int'l Corp. v. Boas*, 92 Cal. App.3d 1015, 1034 (1979).) They constitute powerful evidence that the concept of a State Bar, as a body with the powers approved by the legislature, was fully supported by California voters.

4. *The Plaintiffs Have Failed to Show That the Challenged Activities Are Outside the Scope of the State Bar's Authorization*

In their complaint, plaintiffs essentially object to activities in the following five areas:

- (a) lobbying;
- (b) submitting *amicus curiae* briefs;
- (c) financing meetings of the Conferences of Delegates;
- (d) publicizing speeches of the President of the State Bar; and
- (e) distributing public information on judicial retention retention. (Complaint, ¶ 6.)

Significantly, however, plaintiffs have identified no areas beyond the scope of the legislative and constitutional authorization of the State Bar. Plaintiffs have not met their burden as to any of these matters. In fact, all of the matters to which they object are within the scope of authorization for the State Bar.

(a) *Lobbying*

Plaintiffs have challenged the entire lobbying program of the State Bar, without attempting to show that any of this lobbying is outside the scope of the Bar's authority. Plaintiffs thus attack no specific aspect of the State Bar's program of legislative advocacy, but simply the right of the State Bar to engage in any lobbying activity at all.\* Plaintiffs would apparently seek to require the Bar to justify each element in it. This burden, is plaintiffs', not defendants'. As plaintiffs identify no particular improper aspect of the program, the only issue is whether any lobbying activity is permitted. Lobbying by public agencies is clearly permitted under California law, so long as the lobbying is in areas within the authorized jurisdiction of the agency.

Having examined the scope of legislation governing that agency in *Stanson v. Mott*, *supra*, the court concluded that there had been no specific authorization for the use of public funds in the election campaigns at issue in that case. The court distinguished such expenditures from the use of funds for lobbying efforts, and noted specifically that lobbying efforts were authorized even though certain

---

\* Exhibit A to the Declaration of Mary G. Wailes describes the State Bar's legislative programs for 1982.

of the causes advocated might be those which some members of the public might not support:

"[T]he legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute . . . in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave to the 'free election' of the people . . . does present a serious threat to the integrity of the electoral process." 17 Cal.3d at 218. See also *Miller v. Miller*, 87 Cal.App.3d 762, 767 n.2 (1978).

The *Stanson* court made clear, however, that the prohibition against election campaigning did not preclude the agency from incurring any expense in connection with the election. The agency was implicitly authorized, the Court held, to expend funds to inform potential voters. 17 Cal.3d at 220. Indeed, the court stated that

"[I]t would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity." 17 Cal.3d at 221 n.6.

Thus, the court permitted a "fair presentation of facts" but prohibited, as had earlier courts, exhortations to the voters to vote in a certain manner. The standard for the determination of propriety was established as:

"a careful consideration of such factors as the style, tenor and timing of the publication; no

hard and fast rule governs every case." 17 Cal.3d at 222.

Thus, within the limits set by the legislative authorization of the agency, an agency may properly expend funds for purposes related to the agency's mandate so long as the power of the government is not brought to bear unfairly upon the electoral process. The power of agencies to lobby the Legislature, however, is specifically permitted. See *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318 (1927); *Lehane v. City & County of San Francisco*, 30 Cal.App.3d 1051 (1972).

"If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of a government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in others, his recourse is to vote against them." 30 Cal.App.3d at 1056.

Plaintiffs obviously do not dispute that they can vote in State Bar elections, and participate in State Bar activities. Like all other members of the State Bar, they may attempt to affect policy through established mechanisms, but they may not impose their will upon the majority.

#### (b) *Amicus Curiae* Briefs

Plaintiffs' challenge to the State Bar's program of submitting *amicus curiae* briefs is unsupported by any showing that the program is outside of the Bar's specific authorization to advance the science of jurisprudence and to improve the administration of justice.\* Again, plaintiffs

\* Exhibit 6 is a copy of the procedures and guidelines for the *amicus* program.



attack no specific aspect of the State Bar's amicus brief program but rather its authority to file amicus briefs in general.

Plaintiffs' broad request for preliminary relief attempts to force upon the bar the burden to justify every brief filed as germane to the Bar's purposes. To obtain the preliminary relief they seek, however, plaintiffs must show that they are likely to prevail on the merits on this, as on all other issues. Certainly amicus briefs related to "the science of jurisprudence" and "the administration of justice" can be filed in keeping with the functions of the State Bar. Bus. and Prof. Code §6031.

The presentation of positions to a Court in a broad variety of cases parallels the legislative advocacy approved in *Stanson*; the rationale of that case is applicable. Plaintiffs' free speech or associational interests are in no way infringed by the Amicus program. Plaintiffs obviously do not contend that they cannot themselves file amicus briefs if they disagree with any position advocated by the State Bar; as with lobbying, their individual participation is in no way prohibited.

#### (c) *The Conference of Delegates*

The Conference of Delegates is an integral part of the democratic organization of the State Bar, providing a forum for the collegial discussion of caused by representatives of the lawyers of California.\* Plaintiffs attack no specific aspect of activity of the Conference of Delegates,

---

\* Exhibit 7 is a copy of the Conference of Delegates Handbook for 1982. This exhibit describes the Conference of Delegates program.

and they point to no facts showing that the function of the Conference is outside the scope of authorized activities under Bus. & Prof. Code §6031. Plaintiffs have also not demonstrated that they are unable to have their views heard and considered by the Conference. Their objection apparently is that at the Conference a majority view will prevail, and they therefore seek to enjoin the free speech of their fellow lawyers. The whole argument is bizarre. To preliminarily enjoin the Conference in the absence of any record at all would impose an impermissible prior restraint.

#### (d) *President's Speeches*

Again plaintiffs' attack is general and not specific. Plaintiffs seek to preliminarily enjoin *all* dissemination by the State Bar of the speeches of its president. The Bar is charged with undertaking activities concerning its relations with the public. Giving the public access to knowledge of the policies and activities of the Bar through the speeches of its President, along with other educational activities, is thus explicitly within the Bar's mandate and within the scope of activity permitted by *Stanson, supra*.

#### (e) *Public Information on Judicial Retention*

Materials describing the public information project on judicial retention are submitted to the Court as Exhibit 4. These documents demonstrate clearly that as to style, tenor, and timing, this ongoing project constitutes an effort by an informed agency to educate the public, fully, fairly, and impartially, as to matters within its expertise. Under *Stanson v. Mott* and the other relevant authority,



such a program is not only permissible, but it is appropriate and socially desirable. Indeed, in light of its legislative mandate, such a program may, in fact, be an obligation of the State Bar. Additionally, the fact that there is no impending judicial retention election reinforces the proposition that the activity of the State Bar is informational and not campaign related. While it is true that an information program designed to inform the public of the fundamental characteristics of the judicial function and of the historical foundation of an independent judiciary may be said to promote an ideology, this is an ideology intimately connected with the science of jurisprudence and the administration of justice. Once again, however, plaintiffs seek to enjoin an entire program, without having made any showing that they are affected by it or that particular aspects of it are in any way unauthorized. The prospect of plaintiffs' prevailing is at best improbable.

5. *The Cases On Which Plaintiffs Rely Do Not Affect The Controlling California Case Law*  
 (a) *Abood vs. Detroit Board of Education*

Plaintiffs claim that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) governs this case. Except to the extent that it mandates rejection of plaintiffs' claim for injunctive relief, however, *Abood* is not on point.

*Abood* held, in pertinent part, that non-members of a labor union could not be constitutionally compelled to contribute to ideological causes they opposed. The Court held, however, that plaintiffs were not entitled to an injunction because of its effect upon the first amendment

rights of union members. 431 U.S. at 238. Instead, the Court limited plaintiffs to a rebate of a portion of the fees used for purposes other than those for which the union was formed. Except as it imposes such constitutionally mandated restrictions upon the injunctive remedy, *Abood* is otherwise inapplicable to the case at bar.

The difference in the nature of the payment in *Abood* and the tax paid as "dues" to the State Bar by California lawyers distinguishes the case at bar from that portion of *Abood* which provides for partial dues rebate. Plaintiffs in *Abood* were government employees who were not members of a union which had negotiated a collective bargaining agreement with the Board of Education. The agreement provided for an "agency shop," in which those employees who elected not to become members of the union were nevertheless obligated to pay the equivalent of union dues to it. This payment was designed to prevent unjust enrichment to the non-union employee who otherwise would receive the benefit of union representation for which the union members had paid. 431 U.S. at 222.

The result in *Abood*, that of permitting a check-off system by which a non-member could obtain a rebate of that portion of the payments which did not benefit him, is a direct result of an inherent limitation in the principle which allowed the payments to the union in the first instance. The allowance of an agency shop situation could only be justified by the special needs and benefits to be gained from that arrangement in a labor context. Thus, the First Amendment violation in *Abood* was the

direct product of the use of non-members' fees for purposes beyond the scope of the benefits that justified the agency shop.

The State Bar of California is hardly comparable to a labor union. The obligation of lawyers to pay to finance the functions of the State Bar is imposed by statute, not contract. State bar "dues" are in reality a special tax imposed upon those permitted to practice law in this State. Unlike in *Abood*, the State Bar's power to exact "dues" from all active California lawyers derives from the State's power to tax. The pertinent scope of authority to expend this tax is that applicable to public entities and not that applying to private organizations acting by agreement with government.

Furthermore, unlike the situation in *Abood*, there is no infringement upon the democratic process in the expenditures of the State Bar. Because they were not members of the union, the plaintiffs in *Abood* lacked any opportunity to have their voices heard in the policy determinations that led to the union's speech, legislative advocacy, and other activity. In contrast, the State Bar of California is a public entity incorporating an internal model of representative democracy operating within limitations imposed by a democratically elected State Legislature. (See Declaration of Mary G. Wailes.)

(b) *Arrow v. Dow*

Plaintiffs' reliance upon *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M. 1982) is badly misplaced. In that case, a

federal district court in New Mexico held that the integrated bar of New Mexico could not engage in certain specified lobbying activities if those activities were financed with mandatory dues collected by the New Mexico Bar Association. A decision of the district court of New Mexico, however, is not binding on this honorable Court. To the extent that it is inconsistent with decisions of the California Supreme Court and Courts of Appeal, the case must simply be disregarded. The facts of *Arrow* are obviously different from the facts here, and the case was wrongly decided in any event.

*Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450 (1962), holds that all trial courts of California must follow the decisional law of the California Supreme Court and Courts of Appeal. Thus, even if the reasoning of *Arrow* were persuasive (which, as we demonstrate below, it is not) *Auto Equity* precludes this court from adopting it as a principle of decision where there is California appellate authority to the contrary.

Furthermore, *Arrow* does not concern the State Bar of California, which is established by the state constitution and statute; *Arrow* concerns the integrated bar of New Mexico, a creature of a rule of court. Nothing in *Arrow* even suggests that the judicially authorized integrated bar association of New Mexico is charged with the broad scope of public duty imposed upon the California State Bar by the Constitution and statutes of this State. The *Arrow* court held that the New Mexico Bar Association could not assert as authority for its lobbying activity a general duty of lawyers to evaluate and give advice to the public on issues related to the administration of justice or improvement of the legal system. The California State



Bar, however, relies for its authority not upon some general duty, but upon the Constitution of this State and the powers expressly and implicitly granted by the legislature. The analysis of the New Mexico bar is accordingly irrelevant to California.

Moreover *Arrow* was simply decided incorrectly. Although it purports to follow *Abood*, *Arrow* ignores the Supreme Court's explicit proscription against injunctive relief which by restraining organization speech, would impinge upon the First Amendment rights of the majority in the organization.

Significantly, the Ninth Circuit has recently interpreted *Abood* in a manner contrary to the *Arrow* ruling. *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, etc., et al.*, 685 F.2d 1065 (9th Cir. 1982). In that case, the Court held that the concept of collective bargaining (to which even the *Abood* plaintiffs were required to contribute) should be interpreted broadly to include within its scope all nonpolitical ideological expenditures. The case, which involved a union shop agreement (thus, a mandatory membership situation) specifically rejected a narrow definition of the activities to which dissenting plaintiffs could be forced to contribute. The Court determined that the appropriate inquiry is whether "a particular challenged expenditure is germane to the union's work. . . ." 685 F.2d at 1072. Applying that test, the Court upheld a variety of expenditures for such things as convention, litigation, publications, social activities, death benefits, and organizing efforts.

This ruling directly contradicts the approach taken in *Arrow*, in which the district court limited the scope of

activities to those related to the purpose for which the bar was integrated and imposed injunctive relief of the kind expressly prohibited by *Abood*. Thus, even if the facts of *Arrow* were relevant, the decision would not express the law in the federal courts in this circuit.

B. *Even If Abood Were Held To Apply, The Requested Relief Is Not Available*

Even if *Abood* could somehow apply to this case, it constitutes no authority for the relief plaintiffs seek. If *Abood* applied here, no public entity in California could act in the future. Any citizen paying taxes to support any entity could obtain a rebate of his taxes any time such agency presented a position with which he disagreed. Such a result would be crippling:

"Majority rule necessarily prevails in all constitutional government including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles, the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation because of a difference in personal views." *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 150, (1947), cert. denied, 333 U.S. 876 (1948).

1. *The Decision in Abood Does Not Permit the Injunction Requested*

Although plaintiffs attempt to rely on *Abood*, they ignore two vital aspects of that case. First, *Abood's*



prohibition of compulsory contribution was limited to expenditures which were both not germane to the union's duties as a collective bargaining representative and which promoted political or ideological causes. Even as to those areas, however, the Court did

"[N]ot hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of the loss of governmental employment." 431 U.S. at 235-36.

Thus, denial of the broad injunctive relief sought was upheld. 431 U.S. at 241.

In response to this plain limitation on the relief they seek, plaintiffs assert only that it should not apply because the State Bar is a non-voluntary association and because all lawyers must not only pay fees but also be members.

This attempted distinction is not applicable under California law. In *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139 (1947), a union member in a union shop who objected to his union's position on a "right to work" ballot proposition, and who failed to pay a fee levied on the membership to support this effort, was suspended from his employment. The Court held that if the union had concluded, through its established process,

that this was an appropriate purpose of the organization, the Court should not intervene to say that the objective was outside of the purposes of the organization.

The Court likewise rejected plaintiff's contention that the fee requirement was unconstitutional because it represented compulsory expression. The contribution was not an individual expression of the views of the plaintiff, the Court held, nor was the use of the fund a use of his money to express his views:

"[T]he member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest. 'Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union.' " 31 Cal.2d at 149 (citations omitted).

The Court also observed that, in an organization,

[M]ere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods. And compliance -- here payment by the plaintiff of the assessment -- would not stamp his act as a personal endorsement of the declared view of the majority.\* *Id.* at 150.

---

\* Indeed, the Court drew an analogy to a bar association, which uses its funds to support ideas which the majority consider worthy of support, but with which courts will not interfere merely because some members disagree with that position. 31 Cal.2d at 150.

Finally, the Court held that plaintiff's automatic suspension -- the "non-voluntary" aspect of the case -- did not alter its conclusion. The plaintiff had chosen not to pay the assessment, knowing the consequences of his act, and thus had voluntarily undertaken action the results of which he sought to avoid. 31 Cal.2d at 154-55.

There is no United States Supreme Court authority to the contrary. The only other pertinent United States Supreme Court authority of which defendants are aware is *Lathrop v. Donohue*, 367 U.S. 820 (1961). That decision is consistent with *DeMille* and defendants' position here.

In *Lathrop*, the Supreme Court upheld the constitutionality of the integrated bar of the State of Michigan. A plurality of the Court specifically held that the only compulsion involved was the compelled financial support represented by the payment of dues, not any other membership activity. The membership requirement was held to infringe no associational rights. 367 U.S. at 828, 842. In their concurring opinion Justices Harlan and Frankfurter reached the same conclusion. 367 U.S. at 850-51.

Members of the State Bar in California are compelled only to pay their membership fees. They are not compelled to attend meetings, or even to vote on issues on which they are entitled to vote as members of the State Bar. Plaintiffs do not contend otherwise. Thus, on the associational issue, *Lathrop* is the persuasive authority.\*

---

\* Although the Court in *Abood* noted that it did not believe that the majority in *Lathrop* had agreed on any proposition other than that the constitutional issue should be reached,

(Continued on following page)

## 2. *Abood Limits Relief to Activities Which Are Not Germane to the Purpose for Which the Organization Is Formed*

Plaintiffs have made no attempt to demonstrate that the challenged activities are not germane to the purposes for which the State Bar was formed, as those purposes are defined by the California Constitution and the relevant sections of the Business and Professions Code. Instead, plaintiffs simply rely on the *Arrow* case, which declares that any activity outside of the very narrow range of admissions, discipline, and regulation is not germane. This approach, however, fails utterly to meet the burden placed upon plaintiffs by both *Abood* itself and the interpretation of that ruling in *Ellis*. That the *Arrow* court elected not to address this issue does not excuse plaintiffs from this burden.

## IV. CONCLUSION

Without even stating the precise nature of their objections, plaintiffs seek preliminarily to enjoin all activities of the State Bar outside of a narrowly defined area. Plaintiffs seek to force the State Bar to defend all of its activities at this preliminary stage, and thus request this Court to issue an injunction in the absence of hearing any evidence.

---

(Continued from previous page)

431 U.S. at 233, n.29, that statement must be read in the context of the narrow issues presented in *Abood*. The question that is not decided by the Court in *Lathrop* concern infringement of rights of speech. That question was determined in *DeMille*. Thus, if *Lathrop* is authoritative, it is consistent with *DeMille*, and if the *Abood* footnote is read broadly to limit the decision in *Lathrop*, that opinion is still not contrary to the controlling case in California.



After a trial on the merits, this Court can determine whether plaintiffs have met their burden of showing that the activities of the State Bar actually interfere with plaintiffs' exercise of their First Amendment rights because those activities are beyond the scope of the permissible activities of the State Bar. Until then, however, the absence of specificity makes the fashioning of appropriate relief an impossible task. This Court should not become a special master for the State Bar to determine on a case by case basis, and without benefit of trial on the merits, whether an activity by the State Bar is appropriate.

The preliminary injunction plaintiffs seek would greatly alter the *status quo*; the hardship upon the State Bar is great; plaintiffs' chances of prevailing on the merits are unlikely; and a preliminary injunction is an inappropriate remedy. Defendants respectfully submit plaintiffs' motion should be denied.

DATED: January \_\_, 1983

Respectfully submitted

HERBERT M. ROSENTHAL  
TRUIT A. RACHEY, JR.  
MAGDALENE Y. O'ROURKE

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY

ROBERT S. THOMPSON  
STANLEY H. WILLIAMS  
LAURIE D. ZELON  
MARY E. HEALY

By /s/ Robert S. Thompson  
Robert S. Thompson  
Attorneys for Defendants

## EXHIBIT 2

SEAL  
THE STATE BAR OF CALIFORNIA

April, 1982

MULTI-YEAR  
FEE CEILING  
BACKGROUND

AB 3739

STATE BAR OF CALIFORNIA  
MULTI-YEAR FEE CEILING  
BACKGROUND

### Overview

The state Bar of California has proposed a multi-year fee ceiling bill to replace the current method of fixing State Bar members' fees on an annual basis. The fee ceiling would remain constant for four years, except for increases due to inflation and the cost of new state-mandated programs. The following information outlines the multi-year fee ceiling bill and tells why it is needed at this time.

### What does the State Bar do?

The State Bar of California is a constitutionally mandated public corporation within the judicial branch of state government (Cal. Const., art. 6, § 9; Bus. & Prof. Code, §§ 6001, et seq.). It serves as the administrative arm of the Supreme Court in regulatory matters involving attorneys, including admissions, discipline and reinstatement; and it assists in the advancement of the administration of justice.



The State Bar is engaged in the following activities:

- Testing bar applicants and accrediting law schools
- Enforcing professional standards and enhancing competence
- Supporting legal services delivery and access
- Improving the administration of justice
- Providing member services
- Educating the public

A detailed description of these activities is contained in Enclosure A.

*How is the State Bar funded?*

The State Bar's 1982 revenue budget totals \$19,249,067 - no part of which is funded by the state. The State Bar's general fund accounts for \$14,549,486, or 75.6 per cent of this total. Of the portion generated by the general fund, 85.1 per cent in 1982 comes from annual membership fees paid by active bar members (all attorneys entitled to practice law in California) and from interest earned on the fees paid and penalties collected for late payments. The rest of the general fund (14.9 per cent in 1982) comes from state bar activities for which fees are charged; these include law corporation registration, State Bar magazine advertising sales and State Bar Annual Meeting registration fees.

The remaining 24.4 per cent is generated by State Bar activities that are entirely or mostly self-sustaining. Admissions revenue, budgeted at \$3,920,640 for 1982, is derived from test and other fees charged to bar examination applicants. The Department of Legal Specialization's

\$237,700 revenue budget is derived from certification and recertification fees. In addition, \$541,241 in fees support all direct costs for sections, though the general fund pays for staff support.

*What is the money spent for?*

The following is a breakdown of the 1982 projected costs of State Bar general fund programs:

(These costs include pro-ration of general institutional costs of operations that of necessity must be shared by all programs - including those for the Board of Governors, the General Counsel, administrative services, financial services, computer services and personnel services.)

<u>Activity</u>	<u>Projected costs</u>	<u>Percentage of total costs</u>
Enforcing professional standards and enhancing competence	\$ 8,402,749	58.70
Supporting legal services delivery and access	1,194,933	8.35
Improving the administration of justice	1,872,084	13.08
Providing member services	2,510,760	17.54
Educating the public	<u>334,528</u>	<u>2.33</u>
Total	\$14,315,054	100.00

This breakdown is illustrated in a pie chart as Enclosure B and detailed in Enclosure C.

*Who sets State Bar membership fees?*

The Legislature sets the ceiling on State Bar annual membership fees, and the State Bar's governing body fixes the fee within the authorized ceiling.

The State Bar's governing body is a 22-member Board of Governors. Fifteen are attorneys, elected in districts throughout the state by State Bar members. One represents the California Young Lawyers Association. Six are public members appointed by the Governor. Beginning in 1983, as public member terms expire, the Governor will be responsible for appointing four members to the board; the Senate Committee on Rules and the Speaker of the Assembly will appoint one each.

*What does the State Bar's multi-year fee ceiling bill propose?*

With the multi-year fee ceiling bill the Legislature would place a ceiling on annual fees for four years beginning January 1, 1983, and would permit the State Bar Board of Governors to set annual membership fees for each of those years within the maximum. This maximum would not exceed the 1982 membership fees except for:

- An inflation adjustment to preserve the value of 1982 dollars.
- An amount necessary to fund any new activity that is mandated by legislation. The State Bar Board of Governors would retain authority for the funding as long as the mandate is in effect.

In addition, the bill would permit the State Bar to continue to collect up to \$10 per year per member for the building fund.

*What would likely be the impact of this bill on individual members' fees?*

The 1982 basic membership fees, fixed at the maximum authorized by the Legislature, are \$95 (plus \$10 for the building fund) for active members admitted to practice for less than three years and \$165 (plus \$10 for the building fund) for members admitted for three years or more.

The 1981 basic membership fees were \$75 and \$130 respectively. What inflation will be is anybody's guess. But assuming an inflation rate of 8 per cent for the next four years, under the multi-year ceiling, the basic membership fees could be increased by no more than \$13 in 1983, \$14 in 1984, \$15 in 1985 and \$16 in 1986.

These projections and the actual basic membership fee increases for 1969 through 1982 are illustrated in a bar chart as Enclosure D.

*Why is a multi-year fee ceiling proposed?*

A multi-year fee ceiling would provide the most prudent method of assuring funding for State Bar responsibilities in the 1980s. Factors prompting the proposal at this time are a need to stabilize state bar expenses after a decade of rapid growth, a desire to assure program stability and effective management, and completion of a multi-year program planning process.

- *A decade of fiscal pressure.* Prior to the 1970s, the State Bar rarely needed to seek legislative approval of fee ceiling increases. In fact, from 1928 to 1949, the fee ceiling was not raised. However, in the 1970s, the Board of

Governors was required to go to the Legislature several times for fee ceiling increases, as fiscal pressures increased rapidly. Factors in this growth included:

- \* *Inflation.* Between 1971 and 1981, the rate of inflation increased more than 140 per cent.

- \* *Membership gains.* During the 10-year period of dramatic inflation increases, State Bar membership more than doubled – from 33,476 to 72,922. Bar membership became bottom-heavy, with a large percentage of members paying fees at the lowest end of the State Bar's multi-tier dues structure.

- \* *Expanded State Bar responsibilities.* Within the last decade, the State Bar has been thrust into new and broader responsibilities by forces outside the bar, as well as within. The growing intricacies of the attorney discipline and fee arbitration systems have given the bar a more complex and increasingly adversarial role. The general public's continuing and rightful demands for accountability have intensified bar effort to keep the public informed about all aspects of the legal profession – from the fairness of the admissions process to the impartiality of the discipline system. The public's more-litigious stance in the last decade has multiplied the occasions on the which the State Bar is drawn into lawsuits. The State has mandated a number of bar responsibilities including the Commission on Judicial Nominees Evaluation, assistance to the California Law Revision Commission, certification and registration of law corporations and fee arbitration. The Legislature more and more frequently calls on the State Bar for its expertise and background. In an era of rapidly expanding legal fields and changing laws, attorney needs for information in specializes areas of the law are increasingly felt by

State Bar sections. Most recently, reductions in Legal Services Corporation funding have impelled the bar to move into a stronger leadership role in helping provide legal services to the poor.

- *Program stability and effective management.* A number of bar programs necessarily are effective only over the course of several years. In addition, sound management derives from forecasts, projections and planning beyond a 12-month period. Without the assurance of the continued funding that a multi-year fee ceiling would provide, long-range planning and effective management opportunities are impaired. Also, a multi-year fee ceiling would allow State Bar Board of Governors to transfer time and energy from the preparation of materials and presentation needed in support of a yearly State Bar fee bill to the management and implementation of State Bar programs and activities.

- *Program plan.* During the past two years, the Board of Governors conducted the most intensive program and fiscal reviews in State Bar history, as part of the process that produced the 1982 fee bill and, more recently, the 1982 budget and multi-year fee ceiling bill. This in-depth review of bar programs, was guided by the knowledge that the bar must have a plan to live within predictable fiscal limits. The State Bar's current program mix is a solid foundation for stable and effective programming over the course of several years. It can be supported by the existing level of annual fees, subject to cost-of-living increases only.

- *A decade of fiscal pressure.* Prior to the 1970s, the State Bar rarely needed to seek legislative approval of fee ceiling increases. In fact, from 1928 to 1949, the fee ceiling was not raised. However, in the 1970s, the Board of



Governors was required to go to the Legislature several times for fee ceiling increases, as fiscal pressures increased rapidly. Factors in this growth included:

- \* *Inflation.* Between 1971 and 1981, the rate of inflation increased more than 140 per cent.
- \* *Membership gains.* During the 10-year period of dramatic inflation increases, State Bar membership more than doubled - from 33,476 to 72,922. Bar membership became bottom-heavy, with a large percentage of members paying fees at the lowest end of the State Bar's multi-tier dues structure.
- \* *Expanded State Bar responsibilities.* Within the last decade, the State Bar has been thrust into new and broader responsibilities by forces outside the bar, as well as within. The growing intricacies of the attorney discipline and fee arbitration systems have given the bar a more complex and increasingly adversarial role. The general public's continuing and rightful demands for accountability have intensified bar effort to keep the public informed about all aspects of the legal profession - from the fairness of the admissions process to the impartiality of the discipline system. The public's more-litigious stance in the last decade has multiplied the occasions on which the State Bar is drawn into lawsuits. The State has mandated a number of bar responsibilities including the Commission on Judicial Nominees Evaluation, assistance to the California Law Revision commission, certification and registration of law corporations and fee arbitration. The Legislature more and more frequently calls on the State Bar for its expertise and background. In an era of rapidly expanding legal fields and changing laws, attorney needs for information in specialized areas of the law are increasingly felt by State Bar sections. Most recently, reductions in

Legal Services Corporation funding have impelled the bar to move into a stronger leadership role in helping provide legal services to the poor.

- *Program stability and effective management.* A number of bar programs necessarily are effective only over the course of several years. In addition, sound management derives from forecasts, projections and planning beyond a 12-month period. Without the assurance of the continued funding that a multi-year fee ceiling would provide, long-range planning and effective management opportunities are impaired. Also, a multi-year fee ceiling would allow State Bar Board of Governors to transfer time and energy from the preparation of materials and presentation needed in support of a yearly State Bar fee bill to the management and implementation of State Bar programs and activities.

- *Program plan.* During the past two years, the Board of Governors conducted the most intensive program and fiscal reviews in State Bar history, as part of the process that produced the 1982 fee bill and, more recently, the 1982 budget and multi-year fee ceiling bill. This in-depth review of bar programs, was guided by the knowledge that the bar must have a plan to live within predictable fiscal limits. The State Bar's current program mix is a solid foundation for stable and effective programming over the course of several years. It can be supported by the existing level of annual fees, subject to cost-of-living increases only.

The resulting re-allocation of bar resources from 1981 to 1982 is illustrated in the bar chart of Enclosure E.

*What is the 1982 State Bar budget?*

While this background paper has dealt with 1982 State Bar programmatic costs, the actual 1982 operating budget follows a somewhat different format. A copy of the 1982 operating budget, incorporating direct line-item comparisons with the 1981 actual expenses, appears as Enclosure F.

April, 1982

Enclosure A

STATE BAR OF CALIFORNIA  
MULTI-YEAR FEE CEILING  
BACKGROUND

THE STATE BAR ROLE IN PROFESSIONAL ACTIVITIES  
TESTING BAR APPLICANTS AND ACCREDITING LAW  
SCHOOLS

*\*Bar examination*

The state bar acts as an arm of the California Supreme Court in testing and screening applicants for licenses to practice law in this state. The Committee of Bar Examiners, the state bar body that – among other things – examines the qualifications of people who apply to practice law in California, administers the bar examination.

The bar examination consists of a Multistate Bar Examination – a multiple choice section prepared by the National Conference of Bar Examiners (NCBE) and used throughout the nation – and an essay section. Questions for the California essay test are developed during a year-long process. After use, they are included in a national "question catalog" set up in 1953 by the NCBE. At last

count, California test questions comprised a significant portion of the catalog and an even greater percentage of the questions ordered by other states.

California was the first state to introduce a Professional Responsibility Examination, a separate test on bar Rules of Professional Conduct. Today, passage of the Multistate Professional Responsibility Examination, prepared by the NCBE and based on the original California test, is a requirement for admission in California and 20 other states.

The number of law students taking the bar examination has increased dramatically during the last few years – from 6,606 in 1973 to more than 12,000 in 1981. The average pass rate during the 1970s was slightly more than 50 per cent.

Fees charged to applicants taking the examinations support the bar's admissions function.

*\*Law school accreditation*

California and Georgia are the only states with extensive programs for the accreditation of law schools that are not approved by the American Bar Association.

In California, the Committee of Bar Examiners has accredited all law schools that are ABA-approved, plus a number of additional schools in the state. For the most part, standards for accreditation and for ABA-approval deal with the same factors, including a school's faculty, educational program and scholastic standards. Most differences are a matter of degree.



Currently, approximately 15,000 students are enrolled in 16 ABA-approved law schools, about 4,500 in 16 state-accredited schools, and less than 1,000 in 16 unaccredited schools.

*\*Moral character certification*

Rules regulating admission to law practice in California require applicants to be of good moral character.

As part of the Committee of Bar Examiner's process of investigating moral character, bar examination application forms include a personal history questionnaire that attempts to determine whether law students have been convicted of violating a law or ordinance, involved in law suits or disciplinary actions and more.

If the committee believes an applicant's responses on the personal history questionnaire or a state bar investigation may disqualify him or her from practicing law in California, the State Bar Court may hold a hearing. If, after the hearing, the court believes the applicant does not meet moral character standards, then the committee can refuse to recommend the applicant to the California Supreme Court for admission to practice. In this case, the applicant may ask the supreme court to review the committee's finding before making a decision.

**ENFORCING PROFESSIONAL STANDARDS AND ENHANCING COMPETENCE**

*\*Certification for Practical Training of Law Students programs*

Practical Training of Law Students programs give qualified law students carefully supervised on-the-job

training in actual law office and courtroom situations. In 1981, the state bar certified approximately 1,700 students for participation in these programs.

*\*Developing new Rules of Professional Conduct*

New rules or changes in existing rules relating to professional ethics are formulated by the Committee on Professional Responsibility and Conduct – sometimes working with bar staff. Rule changes are suggested by lawyers, local bar associations, judges, the public, members of the Board of Governors and committee members themselves. The proposed rules move from the committee to the Board Committee on Lawyer Services to the Board of Governors which may reject or adopt the proposals. Before formal adoption, the board publishes a rule proposal or change for comment by members of the profession and the public. Upon adoption by the board, the rule is recommended to the state Supreme Court and becomes effective only after court approval.

Continued study and change in the Rules of Professional Conduct ensure that the rules protect the public, reflect the changing needs of society and the changing nature of legal practice, and articulate to lawyers and the public the standard of conduct required of those licensed to practice law in California.

Since 1979, the court has approved a number of state bar regulatory proposals including rules that require an attorney to notify a client of a written settlement offer, allow an attorney to continue to represent a client even if the attorney or a member of his firm might be called as a witness in the case, permit attorneys to pay each other



referral fees under certain circumstances and allow lawyers to advertise in any medium as long as the communication is not false or misleading.

*\*Ethics opinions*

The Committee on Professional Responsibility and Conduct issues advisory ethics opinions upon requests from members of the bar. The opinions clarify the meaning of general rules or standards as they apply to a specific situation, indicating whether – in the committee's opinion – a particular act is likely to subject a lawyer to discipline.

Ethics opinions are issued by the committee when no similar service is provided by a local bar association in the area from which the request comes or when a local bar association refers a request to the committee.

The committee's opinions are published in the *California Lawyer* and distributed to legal publications when the committee believes the opinion involves an issue of broad or novel interest. Others are issued by letter to the persons who requested the opinions.

Recently the committee published an opinion on the ethical responsibilities of attorneys employed by legal services programs whose funding may be terminated or substantially reduced.

*\*Ethics "hotline"*

Recently, the bar improved its method of helping lawyers deal with ethical problems, prevent misconduct and improve lawyer-client relations. The bar now staffs

an ethics "hotline" that answers questions from lawyers. Last year, the bar received more than 8,000 phone calls and letters. This unit answers urgent inquiries that cannot wait for the Committee on Professional Responsibility and Conduct to issue a written opinion.

*\*Unauthorized Practice of Law office*

This bar office serves as watchdog to protect both the legal profession and the public from individuals and companies that dispense legal advice without a license. The office receives more than 1,000 complaints each year.

A plan to expand the enforcement activities the state bar's Unauthorized Practice of Law Department has received the tentative approval of the Board of Governors and currently is being circulated for comment. It would change the way complaints are processed, dramatically enlarging the state bar's enforcement power. The plan recommends a state Supreme Court rule authorizing the board to appoint a Committee on Unauthorized Practice of Law – including lawyer and public members – that would investigate UPL complaints, conduct hearings, issue cease-and-desist orders and initiate contempt proceedings in superior court if the order is ignored.

*\*Disciplinary system*

The state bar's disciplinary and related functions are its largest single budget item.

The bar acts as an arm of the state Supreme Court in investigating complaints against lawyers and recommending discipline for those found guilty of professional misconduct.

The California system has served as a model for the nation. In 1970, a national commission reported a "scandalous situation" in legal discipline systems and recommended 36 changes. In almost every case, the California system reflected the solutions.

Recent improvements in the system include a reorganization unifying nine boards and committees with different sets of rules into one State Bar Court. It also further separated the system's prosecutorial and adjudicative functions, an advancement in due process.

The State Bar Court now has four departments. Investigation department referees determine whether complaints against lawyers justify formal hearings. Hearing department referees conduct formal hearings. A review department, with additional referees, reviews matters within the jurisdiction of the State Bar Court and makes final determinations in all Client Security Fund matters. In January 1982, the Board of Governors approved the creation of the probation department. The Supreme Court today imposes conditions of probation in more than 80 per cent of its orders of attorney suspension. Referees of the probation department, which now is being formed, will work to ensure compliance with the terms of an attorney's probation.

Both the public and the legal profession are represented among the hearing department's 318 referees and the review department's 15 referees. The investigation department's 204 referees are all lawyers. These referees support the bar's disciplinary process with an estimated 15,000 hours of volunteer time annually.

Complaints against lawyers rose from 4,187 in fiscal 1973-74 to 6,946 in 1981. Some 938 complaints warranted consideration by investigation referees. Seventy reprovals were issued by the State Bar Court last year, and suspensions and disbarments imposed by the Supreme Court totaled 92 in 1981. In addition, 113 admonitions or warnings - added to the program in 1976 - were issued last year.

#### *\*Client Security Fund proceedings*

A Client Security Fund, created in 1972, may pay clients up to \$25,000 for losses due to an attorney's dishonest conduct. As of July 31, 1981, the fund had paid more than \$1,270,000 in 302 cases. The fund is supported by special assessments paid by all California attorneys.

#### *\*Alcohol Abuse program*

The state bar Alcohol Abuse program, patterned after Alcoholics Anonymous, helps attorneys resolve drinking problems that affect their work. Since 1973, about 1,500 lawyers and judges have participated in the program, and almost two-thirds have successfully handled their drinking problems. The bar also operates a pilot program in its disciplinary process that refers lawyers to the Alcohol Abuse program for evaluation and possibly as a condition of probation.

#### *\*Mandatory fee arbitration*

Following enactment of a state bar-sponsored law that requires a lawyer to arbitrate a fee at a client's

request, the bar established minimum standards for local bar association arbitration panels dealing with fee disputes. Currently, there are 35 local panels throughout the state. The state bar provides the arbitration service in areas where no local bar lawyer/client fee arbitration program exists. During 1980, these programs handled more than 2,000 fee disputes.

*\*Specialization certification*

About 2,000 California lawyers have been certified as specialists in a state bar pilot program that identifies experts in tax, workers' compensation, criminal law and family law. To qualify as certified specialists in their fields, lawyers are required to pass examinations, meet experience requirements and continue their legal educations.

Recently the Board of Governors voted to establish a permanent speciality-certification program to replace the pilot program. Proposed rules and regulations for the permanent program now are being drafted by a special state bar Committee on Specialization.

*\*Maintenance of professional competence*

In addition to its pilot program in legal specialization, the state bar is engaged in a variety of efforts to encourage and maintain professional competence among attorneys.

With the University of California at Berkeley extension program, the bar co-sponsors a year-round series of Continuing Education of the Bar workshops, seminars

and practice sessions for its members. In fiscal 1980-81, CEB had more than 64,000 enrollments for 870 seminars in 65 California cities. In addition, the bar's sections offer educational programs in many areas of the law and in the area of law office management.

Currently, the bar's Committee on Maintenance of Professional Competence is preparing a survey of local bars in order to correlate the voluntary work being done in peer assistance, such as alcohol abuse programs, lawyer-to-lawyer referral programs, client relations committees, etc. It is anticipated that the survey may lead to publication of a resource book that would assist local bars in finding solutions to competence problems. The committee also is studying a bill that would require mandatory continuing legal education for California attorneys, although it recently made a report to a Board of Governors committee expressing its disapproval of this concept.

At the same time, the bar is monitoring a number of other competence-related developments: A proposed definition of the term "lawyer competence" tentatively has been approved by the Board of Governors and circulated for comment. A new Committee on Legal Specialization has been formed to create a permanent certification program. An ethics handbook for attorneys is being developed. A new system of disciplinary probation will go into effect this year.

California Young Lawyers Association efforts in the attorney competence area include sponsorship of programs - dealing with setting up a law practice, going into individual practice and other subjects - around the state;



compilation of a videotape library for groups on such topics as trial techniques and evidence, and the publication and sale of a handbook on opening a law office. Currently, the organization is revising a guide to professional conduct for the new practitioner.

In 1979, the state bar sponsored the country's first major conference on entry-level competence. In 1980, the first of a proposed series of board conferences addressing the competency question launched an effort to define minimum skills and to establish minimum standards for those skills that should be required to obtain and hold a license to practice law.

#### SUPPORTING LEGAL SERVICES DELIVERY AND ACCESS

##### *\*Lawyer Referral Services*

California has more than 85 Lawyer Referral Services operating in compliance with State Bar of California standards. Sponsored by bar associations, community groups or legal services organizations, these Lawyer Referral Services refer consumers to lawyers who may be able to handle their legal problems.

The state bar first adopted "Minimum Standards for a Lawyer Referral Service in California" in 1956 as a means of regulating and maintaining Lawyer Referral Services for the public benefit. The standards now in effect were adopted in May 1976 and most recently amended in April 1982.

In conjunction with administering the minimum standards, the bar's Lawyer Referral Services program serves as an informational clearinghouse, conducting statewide

workshops and distributing information about the operation and maintenance of Lawyer Referral Services.

##### *\*Voluntary Legal Services Program*

The State Bar's Voluntary Legal Services Program (VLSP) was created in 1978 to provide assistance to the private bar in the development of low- and no-fee legal services programs through technical assistance in the areas of program development, coordination of resources, recruitment of attorneys and development of training programs and materials.

As part of this support, VLSP has produced several training manuals for volunteer programs and attorneys. These include *The Pro Bono Tool Box*, a "how to" manual designed to assist in beginning or expanding a *pro bono* program; *Domestic Relations Overview and Update*, a current summary of family law for attorneys who handle such cases on a *pro bono* basis; *The Pro Bono Directory*, an up-to-date listing of free and reduced-fee legal services in California designed to permit appropriate referrals and to tell attorneys where they may volunteer their services; the *Legal Rights of Battered Women in California*, which discusses civil, criminal and personal options for victims of domestic violence; and the *Immigration and Deportation Defense Manual*.

Since its inception, VLSP has actively engaged in on-site follow-up and back-up activity related to program development and administration. Additionally, VLSP has coordinated and developed resources provided by others through its lending library and grant-proposal review to further assist local programs.

VLSP has been instrumental in the creation of numerous new programs and currently supports the efforts of a wide variety of existing programs throughout the state to maintain and expand the delivery of legal services to low income individuals through the voluntary effort of the private bar.

*\*Research and development of legal services proposals*

The bar's Legal Services Section has hundreds of volunteer lawyers, judges and public members working on 10 standing committees to help extend legal services to the poor, middle income people, prisoners, the aging, the handicapped and people with special needs. It also focuses on improving delivery services in the areas of consumer law, public interest law and criminal defense services.

The bar's work in promoting greater access to the legal system dates almost from the organization's beginning. In 1928, the state bar encouraged and fostered, through local bars, legal assistance committees which led to today's Legal Aid Society, Legal Services Foundation and other similar services for the poor. The bar also encouraged the United States Congress to create the Legal Services Corporation which has been a major source of funding for legal services programs in California and other states.

Recent section legislative activities include analysis of significant legislation affecting landlord-tenant relations, class action procedures, statutory compensation of public-interest attorneys, and expansion of the jurisdiction and litigant services offered by small claims court.

A major section legislative proposal that became law on January 1 will use interest on nominal and short-term deposits in unsegregated client-trust accounts to fund qualified legal-service programs and support systems. The state bar is beginning to develop procedures to implement the new law; however, actual implementation will not take place until the bar obtains an Internal Revenue Service ruling confirming the preliminary understanding that interest earned under the new law will not be considered taxable.

And, as Congress and President Reagan threaten to eliminate or substantially reduce LSC funding, the bar is working to ensure the continued delivery of legal services to the poor. In addition to active lobbying efforts, in June 1981 the bar sponsored a conference for state and local bar leaders aimed at assessing some of the ethical and delivery problems that California lawyers will face as the LSC prepares to cut back its services.

The section also reviews state bar policies relating to the delivery of legal services. For example, it was instrumental in formulating rules for lawyer advertising that facilitate access to the legal system.

*\*Conferences and workshops*

The Legal Services Section produces educational programs for both lawyers and the public on a variety of subjects - including group and prepaid legal services, public interest law, Lawyer Referral Services, nursing home litigation and special education. These programs deal with both substantive and practical concerns.

## EDUCATING THE PUBLIC

### *\*News-media relations*

The news-media relations program has established the state bar as the primary source for information on the legal profession and the law in California. It informs and educates the public on its legal rights, the law, the courts, lawyers and the legal profession through television, radio and the press.

This effort incorporates a variety of communications techniques including news releases; background papers; interviews with bar governors, staff and members; press conferences; editorial board meetings at major newspapers; background sessions for radio and television editorial directors and a special outreach program that this year involves the state bar president giving a series of major speeches on crime before prestigious public forums such as Town Hall in Los Angeles and the Commonwealth Club in San Francisco.

### *\*Pamphlet program*

In the last year, the state bar has distributed approximately one million copies of pamphlets on consumer rights, the law and the legal system. Topics covered to date are small claims court, wills, lawyer/client fee arbitration, auto accidents, landlord/tenant rights, home-buying, bankruptcy, estate planning, contracts, dissolution, ways to find and hire a lawyer, lawyer discipline and, for young people a pamphlet titled *Do I Want to Become a Lawyer?*

Several new pamphlets will be issued during 1982. They will deal with substantive law topics, including arrest, child custody, immigration law and elderly rights.

State bar-produced radio public service announcements advertise free pamphlets and give legal tips to consumers about their rights and responsibilities under the law. Recorded by professional "voices" and broadcast regularly by more than 50 California radio stations, these 30-second PSAs will generate \$250,000 in free air time for California lawyers this year alone.

In 1982, pamphlets also are being promoted by news releases and law quizzes distributed to general-circulation newspapers, posters in public libraries and social security offices and advertisements in legal publications. Single copies of each pamphlet are provided free to consumers; multiple copies are sold at cost to lawyers, law firms, local bar associations and various institutions and groups.

## IMPROVING THE ADMINISTRATION OF JUSTICE

### *\*Assistance to legislators*

Each year, the state bar assists the legislature by reviewing hundreds of bills and making recommendations to both houses on the merits of many. The bar has sponsored a lengthy list of legislation including:

- A continuous streamlining and updating of small claims court procedures.
- Simplification of probate procedures such as broadening the scope of independent administration of estates, reduction of court involvement, and reform of inheritance tax law.



- The civil arbitration law.
- The attorney-client arbitration law.
- The "long-arm" statute.
- Revision of the General Corporation Code and the Nonprofit Corporation Code.
- Creation of the Judicial Performance Commission.
- The Civil Discovery Act.
- Bail reform measures. In fact, the bar has led the bail reform movement since its beginning.

Legislative positions adopted by the bar follow a lengthy process of research and evaluation by state bar sections and committees, usually originated by an inquiry from an individual member of the bar, a legislator, a government agency, or the bar's Conference of Delegates or Board of Governors.

The bar's 11 sections and 22 standing committees work year-round to study and propose improvements in the law. Last year, more than 500 members of standing committees and sections volunteered more than 34,000 hours to review, research and draft legislative proposals.

At the annual meeting of the bar's Conference of Delegates, 500 representatives of California local bar associations consider more than 100 resolutions - most of which would require legislation to be implemented. Resolutions adopted by the conference are referred for study, recommendation and report to an appropriate state bar section or committee. The Board of Governors and the conference Executive Committee review these reports and place high-priority legislative proposals either on the

state bar's legislative program or the conference legislative program.

Bills sponsored by other groups or individual legislators and dealing with the administration of justice, the delivery of legal services, the legal profession or the state bar are monitored closely by the bar's legislative advocate in Sacramento. Bills that would have a significant effect in those areas are referred for study to an appropriate state bar section or committee. In 1981, bar sections and committees reviewed 2,520 bills and amendments and issued reports on approximately 500 of them. On behalf of the state bar, the Board of Governors may support or oppose those bills that impact the legal profession or the practice of law generally, while individual committees and sections are permitted to support or oppose on their own behalf only bills that impact their own areas of expertise.

#### *\*Assistance to governor*

Under an informal relationship, the bar - on request - provides evaluations and advice to the governor. The requests are directed to an appropriate state bar section or committee for study and in many cases result in a joint effort by the bar and the governor to reform state law. For the past two years, the governor's office has worked closely on a variety of legislative matters with the bar's Family Law and Estate Planning, Trust and Probate sections.

#### *\*Assistance to Judicial Council*

By law, the state bar appoints four representatives to the state Judicial Council, and the bar's Board of Governors comments on proposed changes in the California

Rules of Court and other proposals being considered by the council. Among major items the board has considered are proposals to:

- \*Open to the public proceedings of the Judicial Performance Commission in its investigation of the state Supreme Court's handling of the Tanner case. (Supported.)

- \*Permit recording and photographic coverage of courtroom proceedings by radio and television media for an experimental one-year period. (Opposed.)

- \*Revise rules of court relating to selective publication of appellate opinions. (Supported.)

State bar sections and committees also recently assisted the Judicial Council in its study of the "rent-a-judge" or judicial reference procedure.

In addition, the bar recommends nine names to the Chief Justice of the state Supreme Court for appointment to the 18-member Judicial Council's Advisory Committee on Legal Forms, which is responsible for modifying existing forms and developing new ones. A state bar staff attorney also works with the advisory committee as needed and the bar Board of Governors reviews all proposed forms changes before their adoption by the Judicial Council.

#### *\*Assistance to California Law Revision Commission*

This role, mandated by the legislature, involves working with the statutorily created California Law Revision Commission in studying, drafting and recommending to the legislature necessary reforms to update state

law. The commission now is working with the bar's Estate Planning, Trust and Probate Law Section, investigating areas in which it might be desirable and appropriate to conform California law to the Uniform Probate Code.

#### *\*State Bar Commission on Judicial Nominees Evaluation*

Since 1980, the bar has been mandated by law to provide for evaluation – by a body appointed by the bar Board of Governors – of all potential judicial candidates for California trial and appellate courts. The task is performed by the bar's 25-member Commission on Judicial Nominees Evaluation. During 1981, the commission made confidential recommendations on about 350 nominees, assisting the governor in making 107 appointments.

In earlier years, under an informal arrangement followed by the current governor and several of his predecessors, the bar traditionally had reviewed persons under consideration by the governor for appointment to the state's trial court bench. Occasionally, the bar also was asked to review a potential nominee to the appellate courts.

#### *\*Judicial system reform*

- Court reorganization: During the 1950s, the state bar co-sponsored California's first major court reorganization, for the first time dividing the state's trial courts into three branches – the justice, municipal and superior courts.

- Commission on Judicial Performance: Legislation sponsored by the state bar in 1976 created the California Commission on Judicial Performance, restructuring the membership and revising the functions of the former Judicial Qualifications Commission in an effort to improve procedures for evaluating questionable judicial performance and investigating allegations of judicial misconduct.

- Small claims court: Since the creation of the small claims court, the state bar has been active in instituting reforms in that system for the resolution of minor monetary disputes, including an ongoing review of the monetary jurisdictions for the court and recommending from time to time increases in that jurisdiction. In 1976, the state bar introduced bills to simplify the court's operations and increase public access to the small claims process - many of which became law in January, 1982.

#### PROVIDING MEMBER SERVICES

##### *\*California Lawyer*

Last year, the *California State Bar Journal* was revamped by Communications Division staff - working under a Board of Governors - appointed Editorial Board - as authorized by the bar governors in 1980. The *California Lawyer* - designed to keep members up to date on the bar, the legal scene, the law and issues affecting California lawyers - began publication in September, 1981.

##### *\*Annual Meeting*

The six-day meeting features section, committee and special state bar panels on legal developments, trends

and issues; the annual Conference of Delegates; Continuing Education of the Bar programs; and panels and products dealing with efficient law-office management. Last year's meeting included nationally known speakers such as F. Lee Bailey, Maureen Reagan and Irving Younger, and self-help panels for personal and professional improvement.

##### *\*Group Insurance*

Malpractice insurance: To help combat increases in the cost of malpractice insurance, the bar studied and approved the concept and approach of a prototype malpractice insurance company operated by lawyers. Currently, the lawyer-run Lawyers Mutual Insurance Company offers malpractice insurance to bar members.

Health, life, accident and disability insurance: The bar Board of Governors approved four plans, underwritten by different insurance carriers, to provide health care coverage for bar members, their employees and their dependents; life insurance for bar members and their dependents; accidental death and dismemberment coverage for bar members and their dependents, and disability income insurance for bar members.

##### *\*California Young Lawyers Association*

This organization, to which more than half of California's 75,000 lawyers belong, serves the special needs of bar members 36 years old and under or in practice less than five years. Among CYLA's benefits are:



- Representation on the bar Board of Governors. To better represent the viewpoint of the beginning lawyer, a seat was created on the Board of Governors for a member of CYLA, selected by the CYLA Board of Directors from among the organization's members. The first CYLA board member was seated in February, 1979. CYLA representatives on the board serve one-year terms.

- Booklets and a videotape program geared toward young lawyers and addressing such subjects as law practice economics and how to set up a law office.

- Discounts on certain Continuing Education of the Bar programs.

- Lawyer employment surveys to keep new lawyers and law school students informed of unemployment and underemployment rates among lawyers and about other job-market trends.

#### *\*Sections*

State bar sections exist to give bar members in a particular field of practice or who share common professional objectives or interests a vehicle for conducting legislative research and analysis; sponsoring specialized seminars, conferences and workshops; and discussing mutual problems and possible solutions. In addition, each section publishes a periodic newsletter for its members. The highly active sections are self-funding through dues contributions by the 29,310 lawyers belonging to the sections, except for legal, administrative and clerical support provided by the state bar.

The bar's 11 sections and their respective memberships are:

\*Antitrust Law (52)(approved April, 1981)

\*Business Law (5,868)

\*Criminal Law (958)

\*Law Office Management (9,247)

\*Estate Planning,  
Trust and Probate Law (3,921)

\*Family Law (2,587)

\*Legal Services (541)

\*Patent, Trademark and Copyright Law (654)

\*Public Law (730)

\*Real Property Law (2,217)

\*Taxation (2,535)

All but two - the Law Office Management and Legal Services sections - address a substantive area of the law. The Law Office Management Section presents programs to enhance lawyer competence by teaching lawyers proper business management techniques and studying possible ways of increasing the economical delivery of legal services to the public to improve their access to legal help.

Delivery issues also are the focus of the Legal Services Section, which was formed to enlist lawyer support in the innovation, development and improvement of systems to provide access to legal services, particularly to the middle-and low-income populations of the state. Areas of study by the section include Lawyer Referral Services, legal assistance for the poor, group and prepaid

legal services, criminal defense services, public interest law practice, consumer laws, legal services for senior citizens, legal services for the disabled and prison inmate legal aid. The section also researches, drafts and recommends legislation for the improvement of legal services delivery in California.

#### \*Committees

Twenty-two state bar standing committees perform a variety of functions, ranging from legislative analysis to assisting lawyers suffering from alcoholism:

- \*Administration of Justice
- \*Adoptions
- \*Alcohol Abuse
- \*Appellate Courts
- \*Committee to Confer with the California Medical Association
- \*Condemnation
- \*Continuing Education of the Bar
- \*Courts
- \*Ethnic Minority Relations
- \*Environment
- \*Fair Trial-Free Press
- \*Federal Courts
- \*Group Insurance Program
- \*History of Law
- \*Human Rights

- \*Jury Instructions
- \*Juvenile Justice
- \*Maintenance of Professional Competence
- \*Professional Responsibility and Conduct
- \*Public Affairs
- \*Rules and Procedures of Court
- \*Workers' Compensation

#### \*Regulatory Boards

- California Board of Legal Specialization: This body administers the bar's 10-year-old pilot program in legal specialty certification, which examines and certifies lawyers meeting state bar minimum guidelines to become specialists in the fields of workers' compensation, criminal law, family law and taxation law. Programs in civil litigation and probate law are under consideration.

- Committee of Bar Examiners: This committee supervises the bar's admissions process, including administering moral character investigations and bar-entrance examinations, and approves accreditation of law schools. In addition, the committee conducts an ongoing analysis of possible bar examination improvements, including a current effort to determine whether the exam should be expanded to include testing of an applicant's practical skills.

- State Bar Court: The court conducts hearings and makes decisions in, among other areas, disciplinary proceedings, moral character admissions cases, Client Security Fund matters and attorney fee disputes. The court offers an opportunity for individual lawyer and public

participation in the disciplinary process as volunteer investigation and hearing referees (currently, there are 540 referees - about 20 per cent of whom are non-lawyers) or as members of the 11-member Executive Committee of the State Bar Court or of the 15-member review department, which reviews all hearing panel decisions.

*\*Law Corporations*

The bar has responsibility for certifying and registering law corporations.

*\*Volunteers in Parole program*

The state bar helps young parolees gain a better understanding of the law and of lawyers as "people." With the California Youth Authority and local bar groups, it co-sponsors Volunteers in Parole programs that help lawyers and parolees form friendships, which many times keep these juvenile offenders from returning to the CYA. VIP programs now operate in Santa Clara, Los Angeles, San Diego, Sacramento and San Francisco counties.

Since it began in 1972, VIP has attracted approximately 1,200 attorneys and a similar number of parolees. Its 1981-82 budget for all five counties is funded chiefly by a \$140,000 CYA contribution. Since the yearly cost of confining a CYA ward currently is more than \$25,000, the program is self-supporting if it keeps just six parolees out of institutions for one year.

*\*Bar services program*

In its 1980 start-up year, this program "tested the water" in a number of areas to achieve better understanding among local, minority and specialty bars and between

these 145 voluntary bars and the state bar. One successful innovation is a monthly newsletter distributed to the 2,300 lawyers most active in the organized bar. CAL BAR VIEW focuses on state and local bar news, "how tos" for local bar programs, summaries of important board actions, deadlines not to miss and resources and ideas for the busy bar leader.

Other bar services projects under way include responding to information requests from bar leaders on a myriad of subjects; publication of the state bar *Directory*, a loose-leaf binder listing persons active in the California bar scene; a bar inventory or survey of voluntary bar association programs, operations, structure and needs to be published in a booklet that distills responses into a readable, useful format; a series of one-day meetings on issues of interest and importance to bar leaders such as lawyer discipline, unauthorized practice of law and public education; and a conference on the particular concerns of minority bar leaders.

Bar services also sponsors a program for bar leaders at the Conference of Bar Presidents; last year's half-day session focused presidents and executives on how to speak effectively and how to deal effectively with the news media. Staff also works with the newly-formed Executives of California Lawyers' Associations to bring programs on better bar management to the state's bar executives.

*\*Information services for members*

This state bar unit receives and answers over 400 specific questions per month, written or phoned in by



members of the legal profession and by the general public as well.

*\*Conference of Bar Presidents*

Planned and chaired by the Executive Committee of the Conference of Delegates, the annual Conference of Bar Presidents is a vehicle for an exchange between the state bar and local bar presidents about state bar activities and programs. It also is an opportunity for bar leaders to discuss with each other common issues and concerns and to explore various alternatives for performing local bar services. In addition, the conference allows local bar association officers to bring to the state bar Board of Governors the views of members in their local groups.

*\*Conference of Delegates*

The conference is the only opportunity for local bar associations to propose, analyze, debate and adopt resolutions dealing with a wide range of issues, including the regulation of the legal profession, the role and activities of the state bar and the bar Board of Governors and, mostly, legislative proposals primarily concerned with the administration of justice, the practice of law and the delivery of legal services.

The conference in 1979 was empowered by the bar Board of Governors to develop and carry its own legislative program for the first time in its history. Under this new system, conference resolutions that are not placed by the Board of Governors in the state bar's legislative program are categorized for further action, with Category I

proposals then pursued in Sacramento by the state bar's legislative advocate. Proposals placed in Category II through IV are advocated by the local bar association sponsoring the original conference resolution or are referred for further study to appropriate state bar sections or committees. Resolutions not dealing with legislation for the most part are advisory only to the Board of Governors.

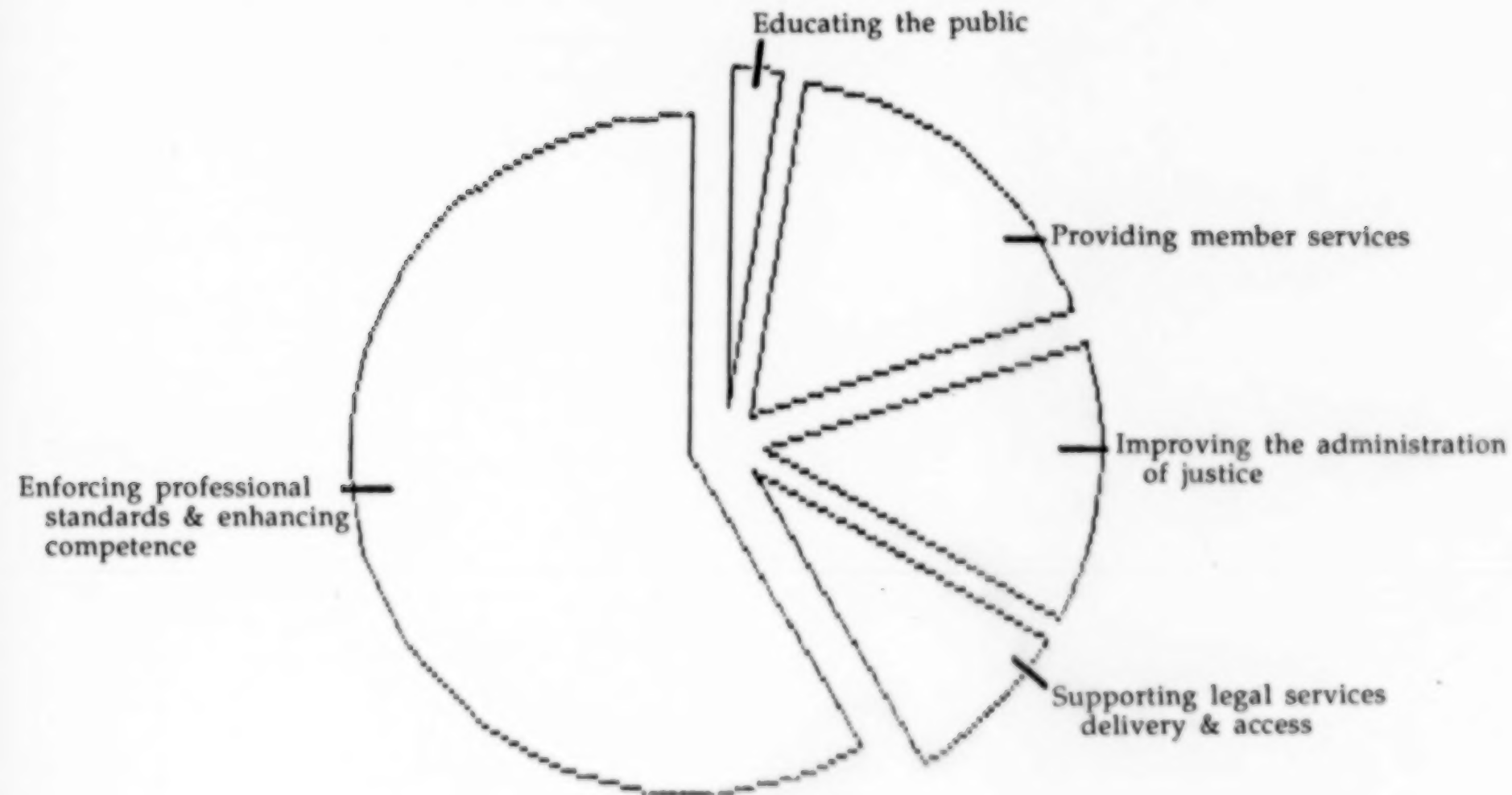
The conference offers a vehicle for significant numbers of lawyers to become involved with organized bar activities in the researching and drafting of local bar-sponsored conference resolutions. In addition, some 500 lawyers and approximately an equal number of alternatives attend the annual conference - held each year in September during the state bar Annual Meeting - as delegates from recognized local bar associations.

03/30/82

## ENCLOSURE B

STATE BAR OF CALIFORNIA  
MULTI-YEAR FEE CEILING  
BACKGROUND

## 1982 PROGRAM EXPENDITURES



ENCLOSURE C  
STATE BAR OF CALIFORNIA  
Multi-year Fee Ceiling  
Background

*Programmatic Analysis of  
1982 General Fund Operating Budget*

These figures include general institutionalized costs of operation that of necessity must be shared by all, including the operation of the Board of Governors, General Counsel (house counsel), administrative services, financial services, computer services and personnel services.



ENFORCING PROFESSIONAL STANDARDS  
AND ENHANCING COMPETENCE

<u>Program Description</u>	<u>Program Cost</u>
Law Corporations	\$ 108,907
Discipline (including Client Security Fund)	
a) Investigations and Prosecutions (Trial Counsel)	5,187,068
b) Adjudication (State Bar Courts)	1,531,182
c) Court Review (General Counsel)	468,056
Admissions	
a) Moral Character Investigations (Trial Counsel)	287,256
b) Legal Advice/Court Review (General Counsel)	208,156
Unuauthorized Practice of Law	252,967
Department of Professional Responsibility and Conduct	280,004
Practical Training of law students	79,153
TOTAL	<u>\$8,402,749</u>

*Programmatic Analysis of  
1982 General Fund Operating Budget*

SUPPORTING LEGAL SERVICES  
DELIVERY AND ACCESS

<u>Program Description</u>	<u>Program Cost</u>
Legal Services Section	\$ 152,469
Legal Services Department	464,322
Lawyer Referral Services	106,602
Voluntary Legal Services Program	378,839
Hot/line feasibility study	21,390
LSC caseload	71,311
TOTAL	<u>\$1,194,933</u>

*Programmatic Analysis of  
1982 General Fund Operating Budget*

IMPROVING THE ADMINISTRATION OF JUSTICE

<u>Program Description</u>	<u>Program Cost</u>
Commission on Judicial Nominees Evaluation	\$ 94,235
Volunteers in Parole	37,027
Legislative Representatives' Office	420,080
Conference of Delegates	313,811
Sections and Committees Support	1,006,931
TOTAL	<u>\$1,872,084</u>

*Programmatic Analysis of  
1982 General Fund Operating Budget*  
PROVIDING MEMBER SERVICES

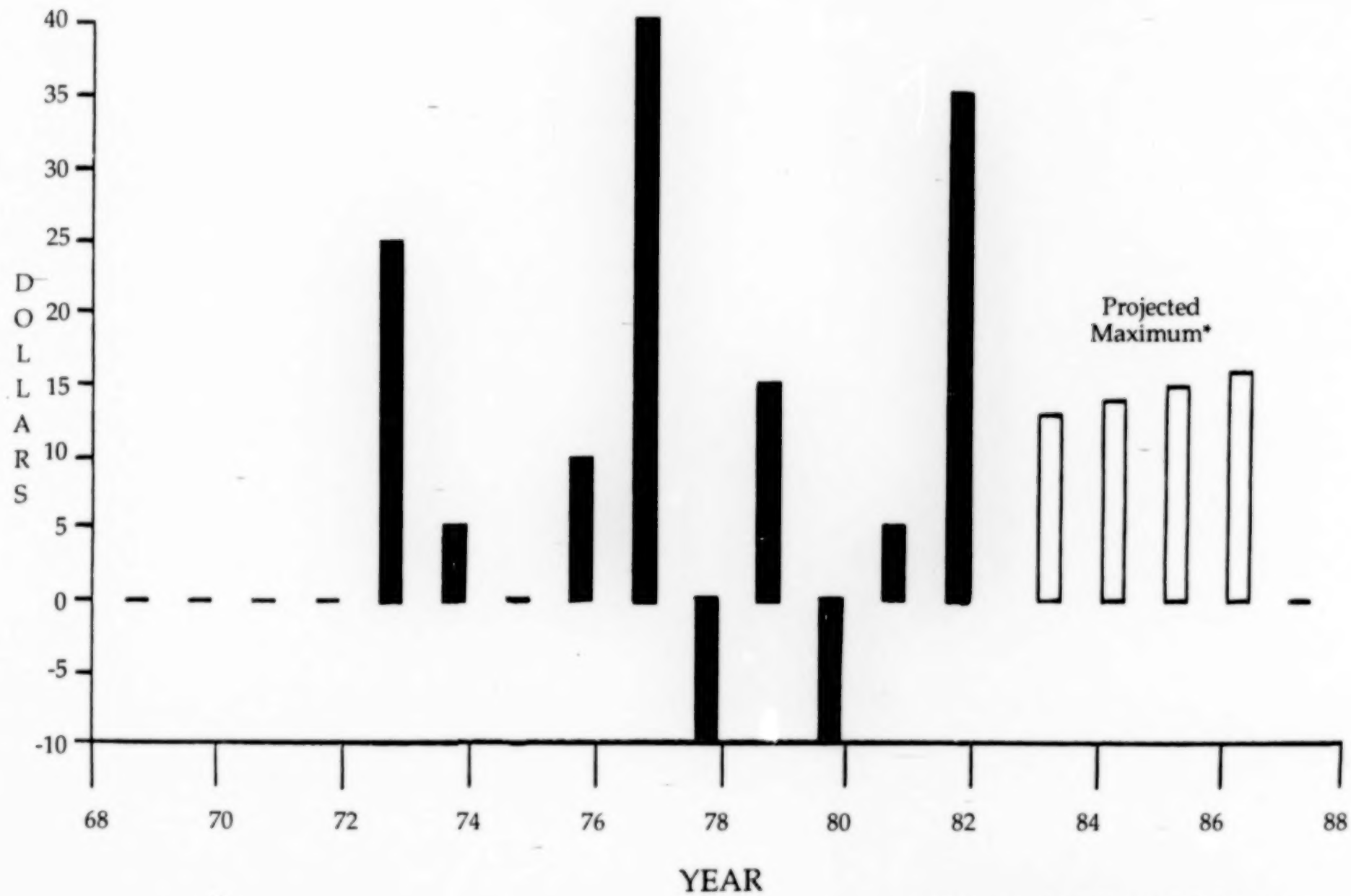
<u>Program Description</u>	<u>Program Cost</u>
Member Group Insurance Program	\$ 52,402
Annual Meeting	481,999
Bar Services Programs	221,186
Membership Communications	1,479,526
CYLA	162,729
Maintenance of Professional Competence	48,453
Alcohol Abuse	64,465
TOTAL	<u><u>\$2,510,760</u></u>

*Programmatic Analysis of  
1982 General Fund Operating Budget*  
EDUCATING THE PUBLIC

<u>Program Description</u>	<u>Program Cost</u>
News Media Relations	\$ 117,916
Public Education Programs	136,080
Information Services	60,394
Public Affairs Committee/Media	20,138
TOTAL	<u><u>\$ 334,528</u></u>

STATE BAR OF CALIFORNIA  
MULTI-YEAR FEE CEILING  
BACKGROUND

STATE BAR BASIC MEMBERSHIP FEE INCREASES 1969-1986

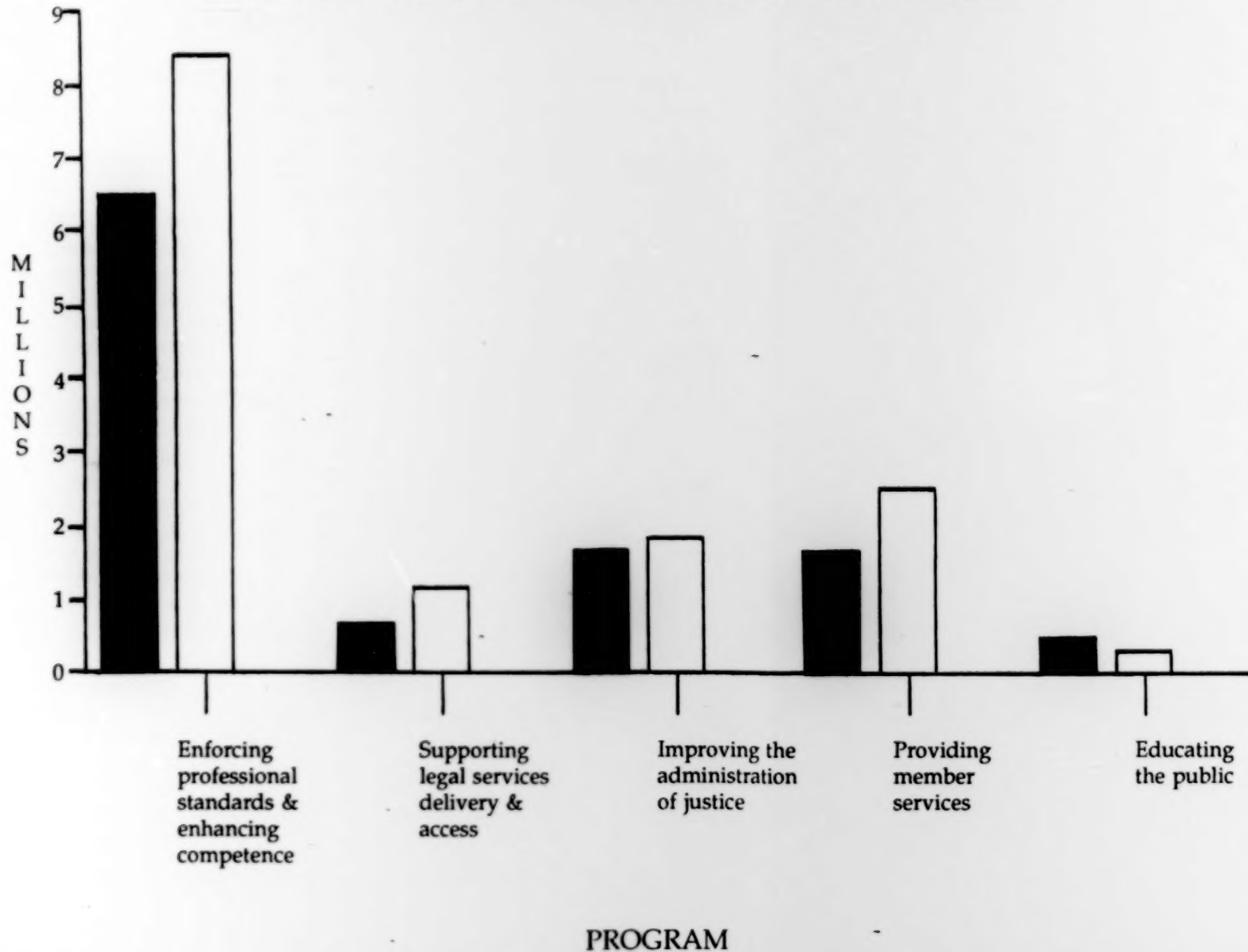


\*Assuming 8 per cent inflation



STATE BAR OF CALIFORNIA  
MULTI-YEAR FEE CEILING  
BACKGROUND

COMPARISON OF 1981 AND 1982 PROGRAM EXPENDITURES



ENCLOSURE F  
STATE BAR OF CALIFORNIA  
MULTI-YEAR FEE CEILING  
BACKGROUND  
THE STATE BAR OF CALIFORNIA  
General Fund

COMPARISON OF 1981 EXPENSES WITH 1982 BUDGET

<u>DIVISION/DEPARTMENT</u>	<u>1981 EXPENSES</u>	<u>1982 BUDGET</u>	<u>INCREASE</u>
(Accrued Basis)			
TRIAL COUNSEL			
Division Office	173407	223141	49734
Trial Counsel - SF	935636	1251674	316038
Trial Counsel - LA	1495864	2079527	583663
Client Security Fund	59092	83656	24564
Moral Character	175427	201434	26007
Subtotal: Amount	2839426	3839432	1000006
Percent of Total	25.76	26.26	0.50
STATE BAR COURT			
Division Office	88805	96378	7573
Court	160735	200293	39558
Court Administration	342772	500440	157668
Court Counsel & Improvement	173932	219695	45763
Fee Arbitration	18504	35793	17289
Probation Monitoring	0	21365	21365
Subtotal: Amount	784748	1073964	289216
Percent of Total	7.12	7.35	0.23
GENERAL COUNSEL			
Division Office	102716	112519	9803
General Counsel	676212	748885	72673
Unauthorized Practice	150111	177433	27322
Prof. Responsibility & Conduct	100181	196440	96259
Law Student Training	1900	55564	53664
Subtotal: Amount	1031120	1290841	259721
Percent of Total	9.35	8.83	-0.53

(Column entitled "Note" had no entries and has been deleted.)

<u>DIVISION/DEPARTMENT</u>	<u>1981 EXPENSES</u>	<u>1982 BUDGET</u>	<u>INCREASE</u>
<b>LEGAL SERVICES</b>			
Legal Services Department	259028	325606	66578
Legal Services Section	73370	106921	33551
Lawyer Referral Services	44111	74761	30650
Voluntary Legal Services	148558	265682	117124
Hot Line Feasibility Study	0	15000	15000
LSC Caseload	0	50000	50000
Subtotal: Amount	525067	837970	312903
Percent of Total	4.76	5.73	0.97
<b>LAW REFORM</b>			
Division Office	80652	0	-80652
Committee Assistance	543137	706153	163016
Sacramento Office	278712	294602	15890
Conference of Delegates	174651	220094	45443
California Young Lawyers Assn.	84666	114140	29474
Alcohol Abuse	28462	45194	16732
Subtotal: Amount	1190280	1380183	189903
Percent of Total	10.80	9.44	-1.36
<b>COMMUNICATIONS</b>			
Division Office	126638	124058	-2580
Media Relations	155115	82804	-72311
Public Education	107789	95559	-12230
Annual Meeting -	317429	338031	20602
Public Meetings	28244	0	-28244
Information Services	48962	42415	-6547
Bar Services	151713	155125	3412
Public Affairs Committee/ Media	26476	14142	-12334
Volunteers in Parole	34771	25955	-8816
Magazine	609777	1037648	427871
Subtotal: Amount	1606914	1915737	308823
Percent of Total	14.58	13.10	-1.47

<u>DIVISION/DEPARTMENT</u>	<u>1981 EXPENSES</u>	<u>1982 BUDGET</u>	<u>INCREASE</u>
<b>GOVERNMENT AND MANAGEMENT</b>			
Government	292401	296750	4349
Management	108229	268727	160498
Judicial Evaluation	73877	66109	-7768
Subtotal: Amount	474507	631586	157079
Percent of Total	4.30	4.32	0.02
<b>FINANCE AND OPERATIONS</b>			
Division Office	73839	148469	74630
Administrative Services	92297	119319	27022
Office Services - LA	145951	161442	15491
PBX - LA	17067	17228	161
Office Services - SF	122833	135705	12872
PBX - SF	56661	68667	12006
Print Shop	103535	126228	22693
Purchasing	30651	53577	22926
Building Management - SF (new)	322867	287549	-35318
Building Management - SF (old)	39361	64005	24644
Building Management - LA	170835	207161	36326
Financial Services	339923	366222	26299
Information Services	73573	81508	7935
Computer Services - SF	252087	342368	90281
Computer Services - LA	6716	26125	19409
Membership Records	293489	366657	73168
Records & Archives	30391	33661	3270
Publications	10507	10000	-507
Word Processing	150300	212956	62656
Personnel - SF	164397	178054	13657
Personnel - LA	52967	66774	13807
Special Services & Insurance	90717	114439	23722
Law Corporations	53458	76284	22826
Subtotal: Amount	2694422	3264398	569976
Percent of Total	24.45	22.33	-2.12



<u>DIVISION/DEPARTMENT</u>	<u>1981 EXPENSES</u>	<u>1982 BUDGET</u>	<u>INCREASE</u>
GENERAL			
Maintenance of Prof. Competence	24259	34056	9797
Executive Staff Salary Pool	0	149500	149500
Salary Savings	0	-250000	-250000
Amortization of Admissions Deficit	0	125000	125000
Grant to Admissions	0	67000	67000
Interdepartmental Credits	-116023	-119135	-3112
Vacation Accrual Adjustment	-42646	0	42646
Change in Vacation Reserve	-44319	20000	64319
Depreciation on Buildings	54522	54522	0
Subtotal: Amount	-124207	80943	205150
Percent of Total	-1.13	0.55	1.68
GRAND SUBTOTAL Amount	11022277	14315054	3292777
Percent of Total	100.00	97.92	-2.08
CONTINGENCY RESERVE Amount	0	304633	304633
Percent of Total	0.00	2.08	2.08
GRAND TOTAL (Accrued Basis)	11022277	14619687	3597410

<u>DIVISION/DEPARTMENT</u>	<u>1981 EXPENSES</u>	<u>1982 BUDGET</u>	<u>INCREASE</u>
ADJUSTMENTS (Accrued Basis to Cash Basis)			
Depreciation (non-cash expense)	-223726	-247867	-24141
Vacation Reserve (non-cash expense)	44319	-20000	-64319
Capital Acquisitions (cash expense)	481655	197666	-283989
Subtotal:	302248	-70201	-372449
ADJUSTED TOTAL (Cash Basis)	11324525	14549486	3224961

## NOTES:

- 1 The State Bar's general fund operating budgets are prepared and presented on an accrued basis. The 1982 budget figures do not yet include depreciation on 1982 capital acquisitions.
- 2 Non-cash items.
- 3 The figures include depreciation (except depreciation on 1982 capital acquisitions) and do not include the total cash cost of capital acquisitions. The total cash cost of capital acquisitions in 1981 was \$481,655 (\$65,167 in loan payments for capital acquisitions in prior years, plus \$416,488 in capital acquisitions in 1981). The total cash cost of capital acquisitions in 1982 is \$344,415. The total cash cost of both 1981 and 1982 capital acquisitions is being financed by a loan taken out in 1982; principal and interest payments on the loan will total \$197,666 in 1982.

## EXHIBIT 5

## AGENDA ITEM

June 204

Policies and Procedures for the Implementation of State Bar Legislative Programs.

## TO: THE BOARD OF GOVERNORS

In fulfilling the mandate given it by your Board to "continuously review State Bar Legislative Policies and make recommendations to the Board for changes as appropriate; (and) approve, publish and evaluate procedures applicable to all State Bar entities implementing such policies", your Committee on Legislation has drafted and requests your approval of the two documents attached hereto.

Attachment I - "Legislative Program of the State Bar of California, Policies and Procedures", - is intended as an informational exposition of the "What, Why and How" of the State Bar's involvement in the legislative area for legislators, members of the Bar and others. In general terms it sets out the purpose, legal basis and scope of State Bar Legislative activity together with the procedures by which that activity is carried out. It describes the activities of the various State Bar entities involved and closes with a short history of State Bar Legislative activity through the years.

Attachment II - "Procedures for Implementing State Bar Legislative Policies" - sets out specific procedures to be followed by State Bar entities engaged in legislative

activities. It defines areas where Sections and Committees, and the Conference may act in their own names in coordination with the Legislative Representative and notifying the Board Committee of all such actions. Actions in the name of the State Bar are reserved to your Board.

The Procedures are the result of many conferences with the Executive Committee of the Conference, the Chairs of the State Bar Sections and Committees involved in legislation, the Legislative Representative and staff. It is believed they satisfy the expressed intent of your Board to more fully utilize the intellectual resources of the members of the Bar, particularly the Conference of Delegates and State Bar Sections and Committees in the legislative area.

Your Committee requests and recommends that both these documents be approved.

/s/ William B. Eades  
William B. Eades, Director  
Department of Sections and Committees

## Attachment I

LEGISLATIVE PROGRAM OF THE STATE BAR  
OF CALIFORNIA POLICIES AND PROCEDURES  
POLICIES

I. Purpose of State Bar Legislative Activity

A. Overall Purpose

The primary purpose of State Bar legislative activity is to bring the expertise of California's

lawyers to the assistance of the people of the State of California through the legislative process. The focus of this activity is the maintenance and improvement of law, the legal system, and the administration of justice.

#### B. *Specific Objectives*

1. *Institutional preservation and advancement.* Through the legislative process the State Bar seeks to preserve and advance its primary mission through the self-regulation of the legal profession.
2. *Information concerning law and the administration of justice.* The State Bar seeks to serve as a resource for current analysis and information on that area of the law broadly defined as the administration of justice.
3. *Broad utilization of members.* The State Bar seeks to attract broad participation of its members in its legislative activity, because they bring a wide range of diverse skills and expertise to contemporary legal issues and problems.

#### II. *Legal Basis for State Bar Legislative Activity*

Section 23 of the original State Bar Act adopted in 1927 (Chapter 34, Statutes of 1927) provided that "the Board shall have power to aid in the advancement of the science of jurisprudence and the improvement of the administration of justice." In 1945 this provision was expanded to include, "but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public" (Business and Professions Code Section 6031).

In creating the Law Revision Commission in 1945 to "recommend such changes in the law it deems necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of the state into harmony with modern conditions" (Government Code Section 10330), the Legislature also directed the State Bar to "assist the commission in any manner the commission may request within the scope of its powers or duties" (Government Code Section 10307).

The Legislature has recognized and called upon the State Bar for assistance in reviewing and implementing legislative proposals. In establishing the Small Claims Experimental Project in 1976, the Legislature directed the Board of Governors to appoint two State Bar representatives to assist with evaluation of the project and to propose further action (Code of Civil Procedure Section 119). In 1979 the State Bar was directed to maintain a list of qualified attorneys from which "special masters" could be appointed by courts to conduct searches of attorney, doctor, and clergy offices (Penal Code Section 1524).

#### III. *Scope of State Bar Legislative Activity*

There are four areas that fall within the scope of the legislative program of the State Bar:

- A. Matters which concern the State Bar itself as the primary agency responsible for the self-regulation of lawyers, for example, legislation affecting State Bar fees or the regulatory functions of discipline and licensing.
- B. Matters bearing on the administration of justice and the practice of law which concern the profession at large, for example, legislation affecting the selection and qualification of judges, arbitration in lieu of civil process, the size of juries, or delivery of legal services to the indigent.



- C. Matters under the umbrella of the "administration of justice" which concern a limited or specialized section of the profession, for example, patent legislation or revision of the nonprofit corporations code.
- D. Law-related questions of public policy which concern society as a whole, and which may affect other institutions with even greater impact than they affect the bar, but on which the expertise of the bar is helpful, for example, constitutional questions or certain matters that are proposed for referenda to the public.

State Bar legislative activity involves itself in these areas regardless of whether a matter is sponsored by the State Bar or is one of the many "bills of others" introduced each year such as the arbitration of civil disputes bill of 1978, which was proposed by the Governor's Office, and recent bills affecting the scope of State Bar responsibility which were sponsored by legislators without the support of the State Bar.

## PROCEDURES

### I. *Participants and Their Respective Responsibilities*

#### A. *The Board of Governors and the Board Committee on Legislation*

The Board of Governors has overall responsibility for the State Bar legislative program. The Board is responsible for positions on legislative matters that are to be publicly attributed to the State Bar and for the resolution of conflicts that may arise among various participants in the legislative program.

The Board of Governors relies upon its Committee on Legislation, which serves as an advisor to the Board on legislative matters and as liaison to other participants such as the Conference of Delegates, committees and sections, and the State Bar

Legislative Representative. Between meetings of the Board the Board Committee acts for the Board on legislative matters; such actions are reported to the Board at the earliest possible date for ratification or modification as appropriate.

#### B. *The Conference of Delegates and Its Executive Committee*

The Conference of Delegates consists of representatives of local bar associations and meets once each year to consider various proposals, many of which are intended for legislative action. The Executive Committee of the Conference consists of representatives from the various State Bar districts, and is responsible for oversight of the annual conference and for implementation of the Conference program.

#### C. *Committees and Sections*

The Board of Governors has from time to time created advisory standing and special committees of State Bar members to assist in the development of its legislative program. To provide broader input and involve a greater number of bar members, the Board in 1975 approved the establishment of sections open to all members of the State Bar interested in a particular field of law. Sections operate through executive committees which are appointed by the Board of Governors and have their own committee structure. There are presently eleven State Bar sections (with a total of more than 22,000 members), covering business law, criminal law, economics of law practice, estate planning, trust and probate law, public law, real property law, legal services, family law, patent and copyright law, and tax law.

State Bar committees, including the executive committees of the sections, range in size from seven to twenty-five members. State Bar policy intends to insure a balanced representation of all

practitioners within a particular field through considering factors such as geography, age, sex, and ethnicity when making appointments to committees. From time to time the Board of Governors also appoints commissions, which differ from committees in that their membership includes representatives of other professions or of the public at large.

D. *Legislative Representative*

The State Bar employs professional representatives who are housed in its Sacramento office and who serve as liaison to legislators and their staff and to other government officials with respect to all aspects of the State Bar's legislative program.

E. *Legislative Program Staff*

The State Bar employs support staff to coordinate all aspects of its legislative program, to maintain continuing liaison with the office of the Legislative Representative, and to assist with the research and studies of committees and sections on legislative matters. Staff insure prompt and complete reporting.

II. *Formulation and management of the Legislative Program*

A. *The Board of Governors and the Board Committee on Legislation*

The Board of Governors meets regularly to act upon recommendations of the Board Committee to determine State Bar positions with respect to legislative matters and to monitor amendments that are proposed during the legislative process.

The Board Committee on Legislation meets more frequently and includes in its meetings representatives of the Executive Committee of the Conference. Following the annual Conference of Delegates the Board Committee reviews and

makes recommendations on the legislative program proposed by the Conference according to the procedures below. The Board Committee also continuously monitors referrals of bills of others to committees and sections, and the reports of committees and sections in response to referrals, and makes recommendations to the Board of Governors concerning such bills.

B. *The Conference of Delegates Legislative Program*

In early March of each year the Executive Committee of the Conference forwards resolutions submitted by accredited local bars for the coming Conference to the appropriate State Bar committees and sections for preliminary review and recommendation as to whether the principle of the resolution should or should not be adopted. These recommendations are submitted to the Conference Resolutions Committee and ultimately to the delegates themselves.

Immediately after the Conference adjourns, resolutions adopted by the Conference are forwarded to the appropriate State Bar committees and sections for a preliminary recommendation (if not previously submitted) or for in-depth study leading to a detailed report to the Conference Executive Committee at the earliest practical date, and no later than December 31.

As early as practicable following the Conference, the Executive Committee classifies resolutions adopted according to the following categories:

*Category I.* These are resolutions of such importance that they should be the primary focus of the Conference legislative program on which the full resources of the Conference and of the State Bar's legislative representatives are used to secure enactment.

*Category II.* These are resolutions of importance which cannot for various reasons (see



section F below), be accommodated in the Conference's primary category. The local bar association sponsoring such a resolution and other interested bars are advised that it has been approved and placed on the local bar coordinated program. The Conference Legislative Coordinator, acting under supervision of the Legislative Representative, assists those bar associations which seek to introduce such resolutions on their own behalf.

*Category III.* These are resolutions that are referred back to their proponents for handling on the local bar grassroots level as Conference work product; however, recognizing that directly supported legislative activity is limited by available resources and political considerations, these resolutions receive no further State Bar or Conference resources.

*Category IV.* These are resolutions that require redrafting or further study and, for the most part, are referred to State Bar sections and committees.

Following review and recommendation by the Board Committee on Legislation and action by the Board of Governors, Category I and II resolutions become the directly supported part of the Conference legislative program for the coming year. The Board of Governors has reserved the authority to prohibit Conference sponsorship of any resolutions in conflict with established State Bar policy and to place any resolution on the State Bar's own legislative program.

#### C. Committees and Sections

Committees and sections meet regularly throughout the year to review resolutions from the Conference, proposals referred by the Board of Governors, and bills of others submitted to

them by the Legislative Representative. They may also consider matters for the legislative program which they wish to propose on their own initiative. Reports and recommendations of committees and sections are reviewed either by the Executive Committee of the Conference or by the Board of Governors depending on the source of the proposal. With respect to a bill that has been referred by the Legislative Representative to a committee or section, the section or committee is required to recommend the priority with which the State Bar should address the bill:

*Priority 1.* To find and recommend that the measure is of such significance that it should be integrated into the State Bar's legislative program and entitled to full support of all resources of the State Bar.

*Priority 2.* To find and recommend that the measure is not of such significance as to receive full support of the State Bar, but is of sufficient significance to the committee or section that the committee or section should be permitted to follow through in the Legislature. In such instances the resources of the Legislative Representative and other State Bar staff are available to assist the committee or section.

*Priority 3.* To find and recommend that the measure is not of such significance as to justify any position or action on the part of the State Bar.

Where representatives of a committee or section appear at hearings on behalf of their committee or section (under a blanket authority from the Board of Governors with respect to priority 2 matters or to matters which the committee or section itself initiates), all such appearances are coordinated with the Legislative Representative



through notice at least 24 hours in advance of the appearance.

D. *Legislative Representative*

It is the responsibility of the Legislative Representative to secure authors for State Bar legislative proposals, to distribute copies of committee and section reports regarding such proposals, to arrange for testimony at legislative hearings, to monitor proposed amendments through the course of the legislative process, and to maintain continuous communication with the Board of Governors (through the Board Committee on Legislation) and with the legislative program staff.

The Legislative Representative reviews all bills of others and refers them to committees and sections as appropriate for comment.

The Legislative Representative reports regularly to the Board Committee on Legislation upon matters referred, and the legislative program staff works with the Legislative Representative to insure appropriate action of committees and sections with respect to matters referred.

E. *Legislative Program Staff*

It is the responsibility of legislative program staff to assist the Conference of Delegates and its Executive Committee and to assist committees and sections with respect to all legislative matters. In particular it is their responsibility to assist with administrative matters and research and preparation of reports, and to inform the Board of Governors (through the Board Committee on Legislation) and the Legislative Representative of actions and recommendations of committees and section.

F. *Criteria for Determining Priorities with Respect to Legislative Proposals*

To assist in the determination of their legislative priorities and subsequent implementation, the Board of Governors and the Executive Committee of the Conference consider the following factors:

*Threshold Considerations*

1. *Importance* to the State Bar, the legal profession, the administration of justice, and the public generally.
2. *Expectations* of the public, legislators, and members of the profession regarding the State Bar's role in the particular policy involved.
3. *Level of support* within the profession.
4. *Likelihood of success* within the legislative process.

*Other Related Considerations*

1. *Importance to society.* Effect of an implemented policy on our total system of government, laws, and relationships of individuals to one another and to society as a whole.
2. *Expertise of lawyers as lawyers.* Do lawyers have a unique province of understanding or a unique role because of their training, knowledge, and experience as lawyers?
3. *Currency.* An appraisal of the currency and relevance of a matter. Will it likely capture attention of key decision-makers in the reasonably foreseeable future?
4. *Potential for achievement.* An appraisal of the chance that a State Bar policy or position can be successfully achieved in whole or substantial part.

5. *Image of profession.* A judgment of how positively the general or the specially concerned public will view the profession in light of a particular policy or position.
6. *Importance to practice of law.* This deals with those "trade" issues which affect lawyers as lawyers, regulating or influencing the basic practice of law.
7. *Scope of State Bar interest.* An appraisal of internal State Bar interest or concern. Is it a matter with association-wide interest, or is it limited to a few interested parties?
8. *Opportunity for impact.* Will a State Bar policy, position, or effort have an impact on actions of decision-makers? Will it contribute to resolution of the issue?
9. *Strength of State Bar support.* An appraisal of the degree of uniformity of the viewpoint which underlies a State Bar position.

#### SUMMARY HISTORY OF STATE BAR LEGISLATIVE ACTIVITY

At its first convention in 1928, the State Bar devoted two full sessions to discussion of reports of committees concerning proposed changes in the law and adopted resolutions approving and urging adoption of constitutional amendments affecting jury fees, criminal jury trials, and appellate court jurisdiction and statutes creating summary judgment procedures revising the corporation laws, simplifying civil procedures (including probate), and expediting criminal trials. Since that time the State Bar has played a major role in the drafting and enactment of more than one thousand legislative changes. Prominent among these have been the Family Law Act, the Civil and

Administrative Discovery Acts, the service of process and long arm statutes, the arbitration of civil disputes, summary probate procedures, the Nonprofit Corporations Act, two revisions of the Corporations Code, the Commercial Code, the Evidence Code, and almost every uniform statute adopted in California.

During the first five years of the State Bar's existence, the legislative program was developed at the annual convention through reports of "sections" and a few special committees. "Sections" were, in effect, individual committees located in the principal geographic areas of the state, each supposedly studying the same legislative problems. This proved unworkable, primarily because of the differing interests and problems of the different areas of the state, and in 1933 the statewide Committee on Administration of Justice (CAJ) was created.

The CAJ was assigned responsibility for studying the administration of justice generally, coordinating the work of all special committees, arranging for research, preparing measures for legislative action, and overseeing legislative activity on measures adopted by the annual State Bar convention. As the law developed and became more complex and the size of the bar increased, other standing committees (and, more recently, sections) were created to undertake similar responsibilities in specialized areas of the law.

Almost immediately after the State Bar was created, however, problems arose because the unified bar failed to coordinate its lobbying effort in Sacramento with local bar associations. In response to these problems, the Board of Governors in 1934 created the "Conference of Bar



Association Delegates," now called the Conference of Delegates. In recent years 65 to 70% of the State Bar's legislative program has come from the work of the Conference. Nevertheless, there was criticism that the Board was not responsible to the Conference because the Board did not support various Conference-approved resolutions dealing with broad areas of social policy. In response to such criticism, the Board in 1979 gave the Conference authority to undertake its own lobbying effort for its legislative measures.

Today the State Bar has fourteen standing committees, ten sections, and two commissions, each composed of experts in a particular field who study a myriad of proposals for law reform, a number of which have been developed by the Bar in conjunction with another entity such as the Judicial Council, the Law Revision Commission, the Commission on Uniform State Laws, or a committee of the state Legislature, and the most significant of which are ultimately retained by the State Bar for sponsorship in the legislative arena.

## Attachment II

### PROCEDURES FOR IMPLEMENTING STATE BAR LEGISLATIVE POLICIES

#### I.

#### PROCEDURES FOR HANDLING AFFIRMATIVE PROPOSALS

##### A. General

Proposals that the State Bar sponsor legislation to correct a perceived problem in the operation of a law or

support a change in a statute, rule of court or administrative procedure are normally referred by the Board of Governors or the Secretary of the State Bar to a section or committee for study and report with recommendations to the Board of Governors. A report of such referrals is made to the full Board. Proposals which will require more than six months study to complete, those which are controversial and those which may result in recommendations which could substantially change the law, first must be reviewed by the Board of Governors, usually acting through its Committee on Legislation. If appropriate for study and report, they are then referred by the Board Committee. Other proposals may be referred by the Secretary of the State Bar. The Secretary refers proposed conference resolutions to the appropriate section or committee in March of each year and the referral of approved resolutions in October. Reports on these resolutions so referred are submitted to the Conference Executive Committee.

##### B. Section and Committee Authority

###### 1) Introduction of Conference Resolutions

Sections, without prior authority or notification of the Board Committee on Legislation, may introduce through their delegates, resolutions for consideration by the Conference of Delegates in accordance with Article VI of the Rules of Regulations of the State Bar.

###### 2) Specific Legislative Proposals

Proposals other than Conference Resolutions for State Bar sponsorship of legislation, whether studied at



the request of the Board, the Secretary or upon the initiative of a section or committee should also be reported to the Board of Governors in the format set out in Attachment A. As with Conference Resolutions, the name of a committee or section member who on behalf of the committee or section may be called upon by the Legislative Representative to testify on the proposal and to accept or reject amendments should be listed in the report.

### 3) Blanket Authority

The Board Committee on Legislation may, upon request or its own initiative, authorize a section or committee to take all action necessary to attain a particular legislative objective in its field of interest in the name of the State Bar. This includes but is not limited to working with another entity to revise the law, administrative rules, regulations, forms or procedures within the area of expertise of the section or committee.

Requests for such authority should include the names of other State Bar entities interested in the matter, appropriate comments and recommendations of such entities, the length of time the section or committee expects to be involved and any fiscal impact the project may have on the State Bar budget.

### 4) Technical Revisions

A section or committee, on its own initiative and in its own name (not on behalf or in the name of the State Bar), may take such affirmative action as it deems advisable aimed at the simplification or technical revision of

the law or administrative rules, regulations, forms or procedures within its area of expertise. Any such action shall be promptly reported to the Board Committee on Legislation and, if legislation is involved, coordinated with the State Bar Legislative Representative. Any proposed legislation shall be reported to the Board Committee on Legislation prior to its introduction in the legislature.

### C. Conference Resolutions

In March of each year, proposed Resolutions to be submitted to that year's Conference of Delegates will be referred to the appropriate sections and committees for preliminary review and recommendation. These recommendations will be sent to the Conference Resolution Committee for its information and will be included in the materials sent to all delegates. Reports should be in a format similar to the reports of the Resolutions Committee, setting out the basic recommendation followed by reasons. Additionally, the report should separately set out the section or committee opinion as to the relative importance of the resolution to the legal profession and to the particular field of law concerned. All such reports should be forwarded to the Department of Sections and Committees for transmittal to the Conference Resolutions Committee no later than May 16.

Where a section or committee recommends disapproval or amendment of a particular resolution, it is encouraged to communicate and, where appropriate, to meet with the proponent to explain its position in greater

detail and attempt to agree upon a mutually acceptable compromise.

As soon as practical after the Conference adjourns, the Conference Executive Committee shall meet and assign each approved resolution proposing legislation to one of the following categories:

Category I - Resolutions to be directly sponsored by the Conference, and lobbied by the Legislative Representative.

Category II - Resolutions to be sponsored by local proponent bar associations coordinated and assisted by the legislative coordinator.

Category III - Resolutions to be referred back to the proponent local bar associations with no further State Bar or Conference action.

Category IV - Resolutions to be referred to the appropriate committee or section for further study.

Sections and committees to whom approved resolutions were previously referred for preliminary report will be immediately advised of this tentative determination by the Executive Committee and furnished copies of any amendments adopted by the Conference. Within thirty days thereafter they shall notify the Executive Committee and the Board Committee on Legislation of any disagreement they have with any of the proposals.

Resolutions in Categories I and II, upon review by the Board Committee on Legislation and approval by the Board of Governors, are placed on the Conference Legislative Program for the next legislative session.

Whenever a resolution adopted by the Conference of Delegates and designated Category I or II is disapproved

by any State Bar section or committee reviewing such resolution, the Executive Committee of the Conference or its designated representative shall correspond or meet with such disapproving section or committee in an effort to resolve the conflict. The process of resolution shall be commenced immediately upon identification of any dispute and shall be concluded no later than January 15 of the year succeeding the Conference.

The Board of Governors has reserved the authority to prohibit Conference sponsorship of any resolution in conflict with established State Bar policy and to also place any resolution on the State Bar's own legislative program.

Sections and committees shall submit no later than December 31, in-depth reports on resolutions in Categories I and II referred to them. These reports should generally follow the format set out in Attachment A. Each report should also list the name of a section or committee member who, on behalf of the section or committee may be called upon by the Legislative Representative to testify on the matter, or to accept or reject proposed amendments.

#### D. Court Rules and Legal Forms

Proposals to adopt new or changed rules of court or legal forms are normally initiated by the Administrative Office of the Courts or the Advisory Committee on Legal Forms and referred to a committee or section for study by the Secretary of the State Bar.



Such proposals should be immediately reviewed and, for the purpose of these procedures only, assigned a priority similar to that set out for bills of others (see Section II).

If a proposal would have little effect on the administration of justice or the particular area of law in which the section or committee is interested and it is felt that no position should be taken (Priority III), a short statement to that effect should be sent by the section or committee to the Administrative Office of the Courts with copy to the Board Committee on Legislation. If such a proposal would not affect the legal profession as a whole but is of such importance to the branch of law concerned that the relevant section or committee should make its position and recommendation known, (Priority II) a report setting out the comments and recommendations of the section or committee should be sent to the Administrative Office of the Court with copy to the Board Committee on Legislation.

If a proposal would affect the bar generally or is otherwise of such importance that the Board of Governors should take a State bar position, (Priority I) a report setting out the comments and recommendations of the section or committee should be submitted to the Board of Governors through the Board Committee on Legislation.

Recommendations for changes in court rules or forms initiated by a section or committee or by someone other than the Administrative Office of the Courts or the Joint Advisory Committee on Legal Forms, should be reported to the Board of Governors through the Board Committee on Legislation.

## II.

### PROCEDURE FOR HANDLING BILLS OF OTHERS

The Sacramento and San Francisco offices of the State Bar subscribe to the Legislative Bill Service and copies of all bills and amendments introduced are maintained in each office. The service includes daily agendas of the various legislative committees. The scheduled date of hearing on any bill may be obtained by telephoning the staff attorney for the section or committee.

All bills are screened by the Legislative Representative, and those bills which impact on a particular area of the law are forwarded to the section or committee responsible for that area for review and report. (Sections and Committees may, of course, review other bills coming to their attention from other sources). Sections and Committees may adopt their own internal procedures for review so long as the recommendation adopted is that of the section or committee and not solely that of an individual member.

On review, the section or committee should classify all bills as Priority I, II or III in accordance with the following criteria:

#### PRIORITY I

Those bills of such importance to the legal profession, the State Bar, or the public, that the State Bar should take an official position and exert its efforts toward the bill's passage, defeat or amendment. If the Board concurs in the assignment of this priority, it will adopt a State Bar position and direct the Legislative Representative to actively work for the adoption of that position by the legislature.



*PRIORITY II*

Those bills which, while they do not affect the legal profession as a whole, are of such importance to the branch of law concerned that the relevant section or committee should make its position known and exert its efforts towards the bill's passage, defeat or amendment; the position recommended on a Priority II bill is transmitted to the author and others interested by the Legislative Representative as that of the reporting section or committee and not that of the State Bar. The Legislative Representative will normally take no further action regarding these bills but must be kept advised of all subsequent communications between the section or committee and the legislature.

*PRIORITY III*

Those bills the passage or defeat of which would have little effect that the administration of justice or the particular area of law in which the reporting section or committee is interested, or on which a position should not be taken or advanced.

Immediately upon receipt of a bill, the section or committee or its authorized representative, should assign a priority and so notify its staff attorney. Within thirty days after receipt, the section or committee should confirm the priority assigned and for Priority I and II bills prepare a report setting out the section or committee's position on the bill and the reasons therefore. For bills in Priority I this report should be sent to the Board Committee on Legislation with copy to the Legislative Representative; for bills in Priority II, the report should be sent to the Legislative Representative and the Board Committee on Legislation advised of the position being taken.

The reason for the relatively short reporting time is that bills may be heard in the first policy committee thirty days after introduction. A section or committee position opposing or recommending amendments to a bill is most effective when made known prior to the first hearing. A position advanced after that date has less impact and frequently upsets both the author and the Legislative Hearing Committee who were not aware of possible problems at the time of hearing.

Sections and Committees are asked to confine their positions on bills of others to the following:

Support

Support if amended

Oppose

Oppose unless amended

Additionally the Board of Governors may adopt a "neutral" position on any bill; this position, meaning that the State Bar neither supports nor opposes a particular bill, has the effect of prohibiting any State Bar entity from taking or advocating any position as would a position of opposition.

If a "support if amended" or "oppose unless amended" position is adopted, the section or committee should set out, at least in general terms, an acceptable amendment. Further, unless a section or committee is opposed to the very concept of a particular proposal, it should attempt to recommend amendments which would make the bill acceptable.

Members of sections and committees may testify and lobby for their position on a bill unless the Board disapproves such actions and provided the Legislative Representative is notified in advance.

It is recognized that there will be occasions when a legislator wishes clarification of a section or committee position or a bill is amended and a hearing scheduled before the amendment can be considered by the section or committee as a whole. To insure a fast response in these instances, sections and committees should consider designating a member as a contact person for each Priority II bill and listing such person's name on the report submitted to the Legislative Representative.

### III.

#### LEGISLATIVE LIAISON

No later than December of each year, the chair of each section and committee which reviews legislative bills, shall designate one of its members as its Legislative Liaison and so advise the Director, Department of Sections and Committees. The Legislative Liaison shall act as the principal contact person for all information concerning the committee or section activities in the legislative field. Liaison shall also be responsible for insuring that all bills referred to the committee or section are promptly assigned a priority which is reported to State Bar staff and that reports on Priority I and II bills are timely forwarded to the Legislative Representative.

### IV.

#### RELATIONS WITH THE STATE BAR LEGISLATIVE REPRESENTATIVE

The Legislative Representative is the official State Bar representative to the legislature, the person to whom the legislators look for information concerning State Bar legislative activities and the primary conduit for the transmittal of information from the State Bar and its entities to the legislature. He is knowledgeable not only of the legislative processes, but also of the philosophies of individual members of the legislature and of the "politics" that is sometimes involved. One of his specific responsibilities is to see that the thoughts of a section or committee on a particular matter are transmitted to the responsible legislators and committees in the most efficient and effective manner. To properly fulfill his responsibilities he must be kept informed of all activities of each State Bar entity that affect bills in the legislature. To this end, any section or committee intending to appear before any Legislative committee must so advise the Legislative Representative at least 24 hours before such appearance. Further, he must be kept advised of all communications with a legislator by a section or committee. The State Bar Legislative Representatives are Ralph Simoni and Terry Flanigan. They are located in the State Bar Office in Sacramento (1210 K Street, 95814) and may be reached at (916) 444-2762. Both representatives can be of assistance in providing up-to-date information and advise as to how to best approach the legislature, and sections and committees are encouraged to make full use of their services.



## V.

RELATIONS WITH THE STATE BAR  
DIVISION OF COMMUNICATIONS

The State Bar Division of Communications is the official "spokesperson" for the State Bar and the primary source of information for the media and the public concerning State Bar activities. Sections and committees are urged to take advantage of the facilities of the Division and to keep it advised of matters under study which may be of general interest to the Bar or the public. Statements and releases to the media by a section or committee concerning a matter under study should be coordinated with the Division in advance. The Assistant Executive Director, Division of Communications, is George Bangs in the San Francisco Office of the State Bar; he can be reached at (415) 561-8283.

## VI.

## APPLICATION OF PROCEDURES

The foregoing procedures apply only to State Bar Standing and Special Committees, Commissions and Section Executive Committees. Other section committees, whether created by the By-laws or by the Section Executive Committee are entities of the Section and have only such authority as is delegated them by the Section Executive Committee.

If such a committee desires to testify or make any public statement concerning a bill or other matter, it may do so only with prior approval of the Section Executive Committee. Any such statement must clearly indicate it is the statement of the Section or the Committee and is subject to all restriction applicable to Section statements.

## ATTACHMENT A

GENERAL FORMAT FOR INTERIM COMMITTEE  
REPORTS OF CONFERENCE RESOLUTIONS AND  
OTHER AFFIRMATIVE PROPOSALS

These reports should be in memorandum form addressed to the Board of Governors, Conference Executive Committee, or Board Committee on Legislation as appropriate. They should include three general areas:

- |                 |  |
|-----------------|--|
| BACKGROUND:     | Summary of present law as interpreted by the courts and a brief summary of the proposal, including reasons advanced by the proponent for its adoption. Where appropriate, discussion of any similar proposals previously considered by the State Bar or Legislature. |
| RECOMMENDATION: | Committee or section recommendation for State Bar action and the vote by which adopted.  |
| DISCUSSION:     | Detailed discussion of reasons in support of committee or section recommendation:  |
|                 | Reasons for any members's failure to agree with the majority or recommendation.  |
|                 | Committee or section opinion as to the fiscal impact of the proposal and its importance to:  |
|                 | A) The State Bar as a whole and,   |



B) The Committee's or section's particular area of the law.

EXHIBITS:

Where affirmative legislative action is recommended, attach a copy of proposed legislation in form for introduction in legislature; where disapproval is recommended, attach copy of proposal.

NOTE: If more than one proposal is being reported, they should be combined into one report, but each should be complete in and of itself so that it can be physically separated from the full report.

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

700 South Flower Street

Sixteenth Floor

Los Angeles, California 90017

Telephone: (213) 629-4200

HERBERT M. ROSENTHAL

TRUIT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

555 Franklin Street

San Francisco, California 94102

Telephone: (415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,

Petitioners and Plaintiffs,

v.

STATE BAR OF CALIFORNIA, a public  
corporation; ANTHONY M. MURRAY;  
PATRICIA GREENE; GIRT K.  
HIRSCHBERG, LELAND R. SELNA,  
JR.; GEOFFREY VAN LOUKS;  
THOMAS W. ERES; JOHN J. COS-  
TANZO; GEORGE W. COUCH, III;  
BURKE M. CRITCHFIELD; THOMAS

R. DAVIS; DIXON Q. DERN; RUTH

CHURCH GUPTA; DALE E. HANST;

LEONARD HERR; ROBERT A. HINE;

PHYLLIS M. HIX; MARTA MACIAS;

PHILLIP SCHAFER; CRAIG A. SIL-

BERMAN; DANIEL J. TOBIN; JAMES

D. WARD; AND JOON HEE RHO,

Respondents and Defendants.

) CIV. NO. 307168

) DECLARATION

) OF MARY G.

) WAILES IN

) SUPPORT OF

) DEFENDANTS'

) OPPOSITION

) OF MOTION

) FOR PRELIMI-

) NARY INJUNC-

) TION

) DATE:

) January 28, 1983

) TIME: 9:00 A.M.

) DEPT.: 16

STATE OF CALIFORNIA )  
 ) ss.  
 CITY AND COUNTY OF SAN FRANCISCO )

MARY G. WAILES declares:

1. I am and, since June 12, 1951, continuously have been an active member of The State Bar of California. I have been continuously in the employ of The State Bar of California as an attorney since October 16, 1961. For approximately the first year of my employment I worked in a variety of areas, e.g., discipline, unauthorized practice of law, assisting State Bar committees, and assisting the Secretary of the State Bar in diverse matters.

2. Commencing in approximately September 1962, I began working with and assisting the Board of Governors; I also continued my involvement with State Bar committees. I assisted in preparing the agendas for the meetings of the Board of Governors; I processed, analyzed and prepared summary sheets for reports of State Bar committees for presentation to the Board of Governors for action. I attended all meetings of the Board of Governors and prepared their minutes.

3. I was appointed an Assistant Secretary of the State Bar effective July 29, 1970, and was elected Secretary of the State Bar effective June 1, 1978.

4. Since September 1970, I have been responsible for preparing and arranging the agendas for all meetings of the Board of Governors. I attend all meetings of the Board and prepare the minutes of its meetings and am responsible for advising appropriate persons and entities of the Board's actions and assuring that its directives are executed.

5. I am custodian of the records of the State Bar and supervise the maintenance of the files and records of the Board of Governors and the agendas, agenda materials, action summaries and inventories of Board of Governors committees.

6. The State Bar of California was created by statute in 1927. The State Bar is a public corporation. Article IV section 9 of the California Constitution provides that the members of the State Bar are all persons licensed to practice law in California. Its membership is divided into two classes: active and inactive. At the present time there are 77,320 active and 8,246 inactive members.

7. The State Bar is governed by a board known as the Board of Governors. The Board is charged with the executive functions of the State Bar and the enforcement of the provisions of the State Bar Act. The Board is provided by the Legislature with authority to make contracts, borrow money, own real and personal property, construct buildings, purchase and lease real and personal property, sell and exchange real and personal property, and do all acts necessary to carry out its functions. The Board is also authorized to aid in all matters pertaining to the advancement of the science of jurisprudence including such matters as concern the relations of the bar with the public. The Board is authorized to make appropriations and disbursements from the funds of the State Bar as are necessary to carry out the purposes of the State Bar Act.

8. The Board consists of twenty-two members. Fifteen members of the Board are elected by the members of the State Bar; through 1982 six were public members

appointed by the governor of the state; and thereafter the governor shares that power with the speaker of the assembly and the Senate Rules Committee; and one member is elected by the board of directors of California Young Lawyers Association from the membership of that association. For purposes of electing the attorney members of the Board, the state is divided into districts and members are elected from each district by the lawyers in that district. Each member of the Board serves for a term of three years, except that the member elected by the California Young Lawyers serves for a term of one year.

9. All State Bar functions are public as established by California law. Constitutional, statutory, rule and decisional duties fall into several categories, among which the principal ones are:

A. The State Bar, in the exercise of its constitutional duties, appoints four members of the Judicial Council and two members of the Commission on Judicial Performance.

B. The State Bar is the administrative arm of the Supreme Court of California. The State Bar is charged with the administration, implementation and enforcement of legislative and Supreme Court standards governing admission to practice law, and discipline of persons admitted to practice and those who would seek readmission after disbarment or resignation. The State Bar must administer, implement and enforce programs ordered by the California Supreme Court concerning specialization and the practical training of law students.

C. The State Bar is charged with enforcing the state law relating to unlawful practice of law and unlawful solicitation of professional employment.

D. The State Bar is charged with the administration, implementation and enforcement of state law governing law corporations.

E. The State Bar is required to assist the California Law Revision Commission, and it aids in all matters pertaining to the advancement of science of jurisprudence and to the improvement of the administration of justice in California.

F. The State Bar or a designated agency of the State Bar is required to evaluate the judicial qualifications of all potential appointees for judicial office whose names are submitted by the governor of California pursuant to law. The State Bar is also required to establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office.

G. The State Bar is required to establish, maintain and administer a system and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the bar of other jurisdictions.

10. To assist the Board in carrying out its functions, the Board appoints committees composed of lawyers and public members who serve without pay. In addition, the Board has created sections to serve members of the Bar who are interested in special areas of the law. Members of the sections pay a small annual fee to help offset the costs of the sections activities.



11. Participation of all members in the activities of the State Bar is encouraged but not mandatory.

12. The functions of the State Bar are supported principally from membership fees. The maximum fees are established by the California Legislature. In 1979, 1980, 1981 and 1982, the legislature provided that the membership fee would remain in effect only for the term of the next year. Thus in 1982, the legislature provided that the fee bill for 1983 would remain in effect only until January 1, 1984. In the course of persuading the legislature to enact a fee bill each year so that the State Bar can continue to perform public functions, the State Bar presents to the legislature a summary of the State Bar's activities planned for the year in which the fee bill is to apply. Exhibit 1, entitled The State Bar of California 1982 Fee Bill Planning Materials, and dated March 20, 1981, is a true copy of the summary presented to the legislature by the State Bar in support of the 1982 fee bill. Exhibit 2, entitled The State Bar of California Multi-Year Fee Ceiling Background, and dated April 1982, is a true copy of the material presented to the legislature by the State Bar in support of the 1983 fee bill.

13. In order to determine the degree of support of the members of the State Bar for the programs and activities of the State Bar, the Board of Governors in 1980 conducted a survey of its membership. Exhibit 3 is a true copy of the summary of the survey conducted for the State Bar by the Field Research Corporation.

14. In 1982, in connection with the State Bar's responsibility to aid in improving the administration of

justice and advancing such matters as concern the relation of the bar with the public, the State Bar undertook a public education project pertaining to the maintenance of an independent judiciary. Exhibit 4, entitled The Case for an Independent Judiciary, a Public Education Project Prepared by The State Bar of California, is a true copy of the material prepared and disseminated by the State Bar in support of this project.

15. The State Bar legislative program is implemented in Sacramento pursuant to policies and procedures adopted by the Board of Governors. Exhibit 5, entitled Agenda Item, June - 204, Policies and Procedures for the Implementation of State Bar Legislative Programs, is a true copy of the policies and procedures approved by the Board of Governors in June of 1981. Attached as Exhibit A is the Final Report of the State Bar Legislative Representative setting forth the State Bar Legislative Program for 1982 and the results of that program.

16. Exhibit 6, entitled Procedures for State Bar Amicus Curiae Participation, is a true copy of the procedures approved by the Board of Governors in May of 1981.

17. Exhibit 7, entitled 1982 Conference of Delegates, Delegates Handbook With Rules of Procedure and Rules and Regulations for the Conference, is a true copy of the rules and procedures approved by the Board of Governors for the regulation of the Conference of Delegates.

18. Since its inception in 1927, the State Bar has maintained a legislative program in Sacramento in which lobbyists have been active. By the late 1930's, both volunteers and paid staff were engaged in lobbying. This

lobbying activity has continued as a major activity of the State Bar since that time to this day. At the present time, in order to enable it to carry out this activity, the State Bar maintains leased office space in Sacramento, three full-time lawyer lobbyists are retained under consultant contract, and nonlawyers are employed to assist the lawyer consultants. If the preliminary injunction sought by plaintiffs were to be granted, the legislative program would be disrupted and the State Bar would have to breach its lease and consultant obligations and incur liability for damages. Also, the employees of the State Bar in the Sacramento office would have to be terminated. If upon trial the injunction were removed it would be extremely difficult and costly to reestablish the Sacramento office of the State Bar with new and inexperienced personnel.

19. The State Bar legislative program is supported by the work of the Conference of Delegates and the committees and sections of the State Bar. These are assisted by professional support staff consisting of experienced full-time employees in the San Francisco office of the State Bar. If the preliminary injunction sought by plaintiffs were to be granted, the work of the Conference, committees and sections would stop. Local bar associations would have to be informed that their volunteer efforts toward processing resolutions for the Conference of Delegates would be to no avail; the work of the Executive Committee of the Conference of Delegates in preparing for next year's conference would have to stop; the 1983 Conference of Delegates meeting would probably have to be cancelled and, as a result, it is unlikely that the Annual Meeting could be held. The State Bar would have to terminate many members of the support staff. Other

staff might be reassigned, but to areas in which they have no experience.

20. Since its inception in 1927, the State Bar has utilized the president as an effective speaker on its behalf. He has articulated the ideas of the Board of Governors about the law, the legal system, and the administration of justice, particularly in California. He has explained the position of the Board of Governors, the programs of the State Bar, the administration of the State Bar and various other State Bar activities and concerns. He has participated in public forums for the purpose of educating the public, or stimulating public thought and discussion on the legal system and the administration of justice. If a preliminary injunction were issued prohibiting presidential speeches, the public would be deprived of information about State Bar programs and legal issues, and the membership would lose a valuable source of information about the State Bar.

22. If the preliminary injunction sought by plaintiffs were issued there would be difficulty in determining precisely what programs were affected because of the overlapping interrelationship of much of the State Bar's legislative and public information programs with its disciplinary and admission functions as well as other areas it regulates. I believe this would have a chilling affect on administration of all State Bar programs.

22. Attached as Exhibit B is the Report of Hemming Morse Inc., Certified Public Accountants. This report sets forth in Schedule 2 the estimated cost per member for the State Bar programs related to the following: judicial independence, Conference of Delegates, legislative affairs,

amicus curiae briefs and presidential outreach (presidential speaking programs). The report states that the total cost of all these programs in 1982 for each active member admitted less than three years is \$4.55, and the cost for each active member admitted more than three years is \$7.95.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 21, 1983

/s/ Mary G. Wailes  
Mary G. Wailes

# EXHIBIT A

## AGENDA ITEM

NOVEMBER 201  
Final Report of  
Legislative  
Representative

November 1, 1982

Attached final report, in five parts, of the Legislative Representative is as follows:

- I. 1982 State Bar Legislative Program pp. 1-5
- II. 1982 Conference of Delegates Legislative Program Sponsored Items Category I pp. 6-11
- III. 1982 Conference of Delegates Legislative Program Sponsored Items Category I to be Amended into Bills of Others pp. 12-13
- IV. 1982 Conference of Delegates Legislative Program Endorsed Items Category II pp. 14-17
- V. 1983 Tentative State Bar Legislative Program p. 18

THE STATE BAR OF CALIFORNIA  
1210 K Street, Sacramento CA (916) 444-2762

Final Report of  
Legislative  
Representative

1982

## STATE BAR LEGISLATIVE PROGRAM

- 1. AB 1209 (Harris)  
*Non-Evidentiary Hearings: Phone in Lieu of Personal Appearance*  
Adds Sections 575.5 and 1006.5 to the Code of Civil Procedure to require courts to use a phone



system in lieu of attorney's personal appearance for non-evidentiary hearings, and permit such use in other matters where it is feasible.

*Origin:* Proposal of Committee on Rules of Court Procedure.

*Reference:* Report of Committee on Rules of Court Procedure dated May 1980.

*Board:* July, 1980 - placed on 1981 Tentative Legislative Program. December, 1980 - placed on 1981 Legislative Program.

*Final Action:* Chapter 411, Statutes of 1982.

2. AB 1950 (Sher)

*Depositions: Electronic Recording and Video Taping*

Amends Sections 2019 of the Code of Civil Procedure. Clarifies current law pertaining to the electronic recording and video taping of depositions.

*Origin:* Recommendation of the Committee on the Administration of Justice.  
1979 Conference Resolution 9-17

*Reference:* Committee on the Administration of Justice Annual Report, 1978.

*Board:* November, 1978 - placed on 1979 Legislative Program.

March, 1979 - dropped from Legislative Program.

July, 1979 - placed on Tentative Legislative Program.

October, 1979 - placed on 1980 Legislative Program.

April, 1980 - Unable to obtain author.

July, 1980 - placed on 1981 Tentative Legislative Program.

December, 1980 - placed on 1981 Legislative Program.

*Final Action:* Chapter 192, Statutes of 1982.

3. AB 1850 (Dennis Brown)

*Labor Code: Employee Benefit Plans - Stock Incentives*

Amends Section 408 of the Corporations Code to clarify the law regarding stock incentives offered to executive employees.

*Origin:* Business Law Section - Committee on Corporations

*Reference:* February, 1981, Report of Business Law Section and Report of Committee on Corporations.

*Board:* March, 1981 - placed on 1981 Legislative Program.

*Final Action:* Chapter 266, Statutes of 1982.

4. SB 1988 (Presley)

*State Bar Act: First Year Law Student Examinations*

Amends Section 6060 of the Business and Professions Code to repeal the requirement that special students take the first year law student examination.

*Origin:* Committee of Bar Examiners.

*Reference:* February 1981 memo from Committee of Bar Examiners.

*Board:* February, 1981 - placed on 1981 Legislative Program.

*Final Action:* Failed passage in Assembly Judiciary Committee. Rereferred to Board Committee on Legislation.

5. AB 3483 (Katz)

*California Copyright Law: Conformity with Federal Copyright Act of 1976*

Repeals Business and Professions Code Sections 14700, 14701, 14702, 14703, 14720, 14740. Repeals

and adds Civil Code Sections 980(a), 981(a), 982(a) and repeals Civil Code Section 983(a) to conform California Copyright Law to the Federal Copyright Act of 1976.

*Origin:* Executive Committee of the Patent, Trademark and Copyright Section.

*Reference:* Patent, Trademark and Copyright Section Report of October 27, 1981.

*Board:* December 19, 1981 – placed on 1982 Legislative Program.

*Final Action:* Chapter 574, Statutes of 1982.

6. AB 3625 (Martinez)

*Juvenile Detention: 15 Day Review of Court Orders Re Commitment*

Amends Sections 726 and 737 of the Welfare and Institutions Code to make review proceedings pursuant to Section 737 more effective and to require that counsel appear at all such review proceedings.

*Origin:* The Committee on Juvenile Justice.

*Reference:* January 9, 1981 Report of the Committee on Juvenile Justice; November 13, 1981 Report of the Committee on Juvenile Justice.

*Board:* December 19, 1981 – placed on 1982 Legislative Program.

*Final Action:* Failed passage in Senate Finance. Rereferred to Board Committee on Legislation.

7. AB 3576 (M. Waters)

*Judicial Council Pleading Forms: Elimination of Mandatory Use*

Amends Section 425.12 of the Code of Civil Procedure to extend the period of optimal use of

pleading forms for actions based on personal injury, property damage, wrongful death, unlawful detainer and breach of contract or fraud to January 1, 1985.

*Origin:* December 10, 1980 recommendation by Committee on Administration of Justice.

*Reference:* November 25, 1981 memo from Committee on Administration of Justice.

*Board:* December 19, 1981 – placed on 1982 Legislative Program.

*Final Action:* Chapter 272, Statutes of 1982.

8. AB 3657 (Rosenthal)

*Reference to Referees: Compelling reference when after agreement one party changes mind*

Amends Code of Civil Procedure Section 638(1) to permit a reference when after the parties have agreed to reference, one of the parties changes his or her mind.

*Origin:* Committee on the Administration of Justice January, 1982 Report to Board of Governors.

*Reference:* March 27, 1981, letter to Monroe Baer of CAJ from Attorney Lawrence Teplin.

*Board:* January 15, 1982 – placed on 1982 Legislative Program.

*Final Action:* Chapter 440, Statutes of 1982.

9. SB 1372 (Davis)

*Subpoenas Duces Tecum, issuance by attorneys*

Amends Section 1985 of the Code of Civil Procedure to clarify that attorneys can, in addition to issuing subpoenas for the attendance of witnesses, also sign and issue subpoenas duces tecum.

*Origin:* The Committee on the Administration of Justice.

*Reference:* January report by the Committee on the Administration of Justice to the Board of Governors.

*Board:* January 19, 1982 – placed on 1982 Legislative Program.

*Final Action:* Chapter 452, Statutes of 1982.

10. AB 3728 (Hart)

*Application for relief against judgment: meaning of "six months" as used in Code of Civil Procedure Section 743*

Amends CCP § 17(4), Civil Code § 14(4) and Government Code § 6804 to clarify meaning of "six months" as used in Code of Civil Procedure § 743.

*Origin:* Committee on Administration of Justice report to the Board January 19, 1982.

*Reference:* Letter from Mr. C. Russell King (February 19, 1981) to William F. Wenke.

*Board:* January 19, 1982 – Placed on 1982 Legislative Program

*Final Action:* Rereferred to Board Committee on Legislation.

11. SB 1924 (Petri)

*Arbitration of Attorneys Fees: (1) attorney notice to client of right to arbitrate; (2) grounds for dismissal; (3) waiver of right to arbitration; (4) automatic entry of judgment; (5) non-exclusion of small claims court jurisdictional cases*

Amends Sections 6200-6206 of the Business and Professions Code to specify that (1) an attorney must give written notice of the right to arbitrate to a client prior to or at the time of filing a lawsuit for the recovery of attorney's fees; (2) failure to

give notice would be grounds for dismissal of any action filed; (3) a client will have waived the right to arbitration if the client fails to request arbitration within thirty days of receipt of the notice; (4) an award, when it becomes final, would be automatically entered in the judgment books of the appropriate court; and (5) in addition, fee disputes falling within the small claims court jurisdiction would not be excluded from the program except as already provided.

*Origin:* Office of State Bar Court Report to Board January 19, 1982.

*Reference:* November 9, 1981 letter from Joyce Parsons, Office of the State Bar Court to Board Committee on Lawyer Services.

*Board:* January 19, 1982 – placed on 1982 Legislative Program.

*Final Action:* Chapter 979, Statutes of 1982.

12. Notice to Health Care Providers: Discipline of attorneys for failure to comply with notice requirements

Repeals Code of Civil Procedure Sections 364 and 365 which bar commencement of an action against a health care provider for the provider's neglect unless notice of intent to sue is given to the provider and provides that an attorney's failure to comply with Code of Civil Procedure Section 364 shall be a basis for professional discipline.

*Origin:* 1981 Conference of Delegates Resolutions 9-12 and 9-13 (Lawyers Club of Los Angeles County).

*Reference:* December 7, 1981 letter to the Board Committee on Legislation from Truitt A. Richey, Jr., Office of General Counsel.



*Board:* January 19, 1982 – placed on 1982 Legislative Program.

*Final Action:* Referred to Joint Committee of California Medical Association and State Bar. See Resolution 3-31-82.

13. AB 3780 (Berman)

*State Bar Review of Qualifications of Judicial Candidates*

Amends Section 12011.5 of the Government Code to specify that the State Bar shall evaluate candidates for judicial office and recommend to the Governor whether the candidate is *qualified* or *not qualified* as defined rather than the current system which uses a . . .

14. AB 3274 (Dennis Brown)

*Eminent Domain Resolution of Necessity and Attorneys' Fees*

Amends Section 1245.230 and 1250.410 of the Code of Civil Procedure and Section 7267.2 of the Government Code to require a condemning agency to make an offer to the property owner prior to adopting a condemnation resolution and to provide a more explicit test for award of attorneys' fees if the matter goes to trial.

*Origin:* Committee on Condemnation.

*Reference:* September 15, 1980, memo, Committee on Condemnation, to Board of Governors.

*Board:* January 1982, placed on 1982 Legislative Program.

*Final Action:* Chapter 1059, Statutes of 1982.

15. AB 2452 (Harris)

*Statutory Will*

Adds Chapter 2.1 (commencing with Section 56) to Division 1 of the Probate Code, to provide for a

statutory will and an accompanying form. The form would allow a testator to elect how to dispose of his or her assets upon death from four specific schemes or by intestate succession.

*Origin:* Estate Planning, Trust and Probate Law Section.

*Reference:* January 21, 1981 Report of Estate Planning, Trust and Probate Section.

*Board:* April 2, 1982 – placed on 1982 Legislative Program.

*Final Action:* Chapter 1401, Statutes of 1982

16. AB 1607 (Ingalls)

*Inheritance Tax Referees*

Amends Sections 609 and 657 of the Probate Code, Chapter 23 of Division 3 of the Probate Code, Article 3 of Chapter 10 of the Probate Code and to add Chapter 23 to Division 3 of the Probate Code and to amend Section 580(a) of the Civil Code and Section 726 of the Code of Civil Procedure relating to Probate Referees.

*Origin:* Executive Committee of the Estate, Planning, Trust and Probate Law Section.

*Reference:* March 23, 1982 Report and Recommendation of the Estate Planning, Trust and Probate Section, relating to the Miller and Rogers' initiatives to repeal inheritance taxes.

*Board:* May 1, 1982 placed on 1982 Legislative Program.

*Final Action:* Chapter 1535, Statutes of 1982.

THE STATE BAR OF CALIFORNIA  
1210 K Street, Sacramento CA (916) 444-2762

Final Report of  
Legislative  
Representative

1982

CONFERENCE OF DELEGATES  
LEGISLATIVE PROGRAM

SPONSORED ITEMS CATEGORY I

17. AB 707 (McAlister)  
*Property Exempt from Execution: Motor Vehicle*
- Amends Section 690.2 of the Code of Civil Procedure to increase the value of a debtor's equity in an exempted vehicle from one not exceeding \$500.00 to one not exceeding \$1,000.00.
- Origin: Lawyers' Club of Los Angeles County.
- Reference: 9-6-79.
- Ex-Com Liaison: Bert Tigerman
- Final Action: Chapter 1364, Statutes of 1982.
18. AB 1883 (Larry Stirling)  
*Arbitration Proceedings: Issuance of Subpoenas*
- Amends Section 1282.6 of the Code of Civil Procedure to require a neutral arbitrator to issue subpoenas and subpoenas duces tecum signed but otherwise blank to the party requesting them.
- Origin: San Diego County Bar Association.
- Reference: January 1981 Committee on Administration of Justice Report. 9-31-79
- Ex-Comm Liaison: Bert Tigerman
- Final Action: Chapter 108, Statutes of 1982.

19. AB 1439 (Floyd)  
*Assigned Counsel: Compensation & Standards*

Amends Penal Code Section 987.2 to guarantee adequate compensation for competent representation of persons who cannot afford to retain their own counsel. In addition, amends Penal Code Section 987.6 to increase state funding for defense services to not less than 20 percent of actual costs to counties and further specifies that the Conference of Delegates urges the State Legislature to fund the State Public Defender's office sufficiently so that it may provide adequate appellate representation of defendants with respect to whom the death penalty has been imposed, and further, to fund the California Supreme Court sufficiently so that it may adequately reimburse appointed counsel in capital cases.

Origin: Santa Clara County Bar Association; San Francisco County Bar Association.

Reference: 2-15 & 2-16-80.

Ex-Com Liaison: Bert Tigerman

Final Action: Failed passage in Assembly Ways and Means Committee. Rereferred to Executive Committee Conference of Delegates. No further action.

20. AB 1983 (Harris)  
*Subpoena Duces Tecum: Service by Mail on Non-party Records Custodian*

Adds Section 1987.6 to the Code of Civil Procedure to permit service of a subpoena duces tecum on the custodian of the records of a non-party business by return receipt mail.

Origin: Alameda County Bar Association.

Reference: January 1981 Committee on Administration of Justice Report. 5-8-80

*Ex-Com Liaison:* Bert Tigerman

*Final Action:* Failed in Assembly Judiciary Committee. Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

21. *ACA 78 (Berman)*

*Judges: Teaching at Public Law Schools*

Amends Article VI, Section 17, of the California Constitution to permit teaching by judges at public law schools within standards set by the Commission on Judicial Performance.

*Origin:* Beverly Hills Bar Association.

*Reference:* 2-8-81

*Ex-Com Liaison:* Thomas Smegal

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

22. *AB 707 (McAlister)*

*Homestead Exemption: Increase in Value*

Amends Civil Code Section 1260 to increase the limit of the homestead exemption for any head of a family or person 64 years of age or older to seventy-five thousand dollars (\$75,000), and for any other person to fifty thousand dollars (\$50,000).

*Origin:* Lawyers' Club of Los Angeles County.

*Reference:* 3-7-81

*Ex-Com Liaison:* Christine Helwick

*Final Action:* Chapter 1364, Statutes of 1982.

23. *AB 1759 (Chacon & Frazee)*

*Subdivision Map Act: Offers For Sale Permitted Before Filing of Final Map*

Amends Government Code Section 66499.30 to permit offers to sell or lease, or contracts to sell or lease, parcels of real property prior to the time the required final subdivision map is filed. Maintains the prohibition against actual sale, lease, or financing prior to the filing of the final map.

*Origin:* Orange County Bar Association.

*Reference:* 3-11-81

*Ex-Com Liaison:* Colin Wied

*Final Action:* Chapter 87, Statutes of 1982.

24. *AB 2913 (Goggin)*

*Evidence: Psychotherapist Privilege*

An act to amend Section 1026 of, and to repeal Evidence Code Section 1028, which applies to criminal proceedings only and restricts the psychotherapist privilege of Evidence Code Section 1010 to psychiatrists and psychologists.

*Origin:* Beverly Hills Bar Association.

*Reference:* 5-8-81

*Ex-Com Liaison:* Philip Hammer

*Final Action:* Vetoed by Governor. Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

25. *AB 3684 (Ingalls)*

*Misdemeanor Procedures: Waivers of Personal Presence*

Amends Penal Code Section 977, subdivision (a) to make clear that an individual charged with a misdemeanor may appear through counsel, allowing



the trial court judge the right to require presence of the defendant only if the defendant is on parole or probation and at sentencing.

*Origin:* San Diego County Bar Association

*Reference:* 5-9-81

*Ex-Com Liaison:* M. John Carson

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Moot.

26. AB 3651 (Harris)

*Probate: Defines "lease" to Include Option to Purchase*

Adds Section 845 to the Probate Code to define the word "lease" to include a lease with an option to purchase and further amends Sections 162, 328, 333, 441, 630, 680, 681, 1000, 1025.5 and 1200.5 of the Probate Code.

*Origin:* Los Angeles County Bar Association.

*Reference:* 6-4-81

*Ex-Com Liaison:* Michael Blaylock

*Final Action:* Chapter 520, Statutes of 1982.

27. *Inheritance Tax: Orphan's Exemption*

Amends Revenue and Taxation Code Section 13801, subdivision (b) to provide that the orphan's exemption is in addition to the exemption applicable to minor children.

*Origin:* Alameda County Bar Association

*Reference:* 6-9-81

*Ex-Com Liaison:* Michael Blaylock

*Final Action:* Moot per Repeal of Inheritance Tax.

28. *Inheritance Tax: Limited Power of Appointment*

Amends Revenue and Taxation Code Section 13693 to provide that a power given to a spouse as trustee to invade trust corpus for the benefit of that spouse, when limited by an ascertainable standard, is not a power of appointment within the meaning of the section.

*Origin:* Alameda County Bar Association.

*Reference:* 6-11-81

*Ex-Com Liaison:* Michael Blaylock

*Final Action:* Moot per repeal of Inheritance Tax.

29. AB 622 (Willie Brown)

*Paternity and Child Support: Compensation of Counsel Appointed for Indigent Defendants*

Amends Welfare and Institutions Code Section 11350.1 to provide that counsel appointed to represent indigent defendants in paternity or child support proceedings shall be compensated for such services out of the county general fund.

*Origin:* The Bar Association of San Francisco

*Reference:* 7-13-81

*Ex-Com Liaison:* Philip Hammer

*Final Action:* Vetoed by the Governor. Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program. Recatergorized as Category IV.

30. AB 622 (Willie Brown)

*Paternity and Child Support: Compensation of Counsel Appointed for Indigent Defendants*

Adds Sections 11354, 11355 and 11356 to the Welfare and Institutions code to provide that counsel

appointed to represent indigent defendants in paternity or child support proceedings shall be compensated for such services out of the county general fund and that the defendant may be ordered to repay all or a portion of such compensation.

*Origin:* San Diego County Bar Association.

*Reference:* 7-14-81

*Ex-Com Liaison:* Philip Hammer

*Final Action:* See Item 29. —

31. SB 203 (Rains)

*Rate of Interest: Judgments*

Adds Section 1033.1 to the Code of Civil Procedure to provide that the rate of interest on judgments shall be ten per cent per annum.

*Origin:* San Diego County Bar Association.

*Reference:* 9-5-81

*Ex-Com Liaison:* Thomas Smegal

*Final Action:* Chapter 150, Statutes of 1982

32. AB 843 (Berman)

*Arbitration; Tolling; Intent; Plaintiff's Request for Arbitration*

Amends Code of Civil Procedure Sections 1141.12, 1141.16 and 1141.17 to specify when an election to arbitrate must be filed, to specify the tolling period for arbitration cases, and to clarify the legislative intent with regard to reimbursement of counties.

*Origin:* Lawyers Club of Los Angeles.

*Reference:* 9-9-81

*Ex-Com Liaison:* Colin Wied

*Final Action:* Failed passage in Senate. Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

33. AB 3712 (Larry Stirling)

*Good Faith Settlement Writ of Mandate*

Amends Code of Civil Procedure Section 877.6 to provide that an order by the court determining that a settlement was or was not made in good faith is not appealable and that the party aggrieved by such an order may petition the reviewing court for a writ of mandate.

*Origin:* Sacramento County Bar Association.

*Reference:* 9-18-81

*Ex-Com Liaison:* Christine Helwick

*Final Action:* Governor Vetoed. Referred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

34. AB 3712 (Larry Stirling)

*Sister State Judgments: Municipal Court Jurisdiction*

Amends Code of Civil Procedure Section 1710.20 (part of the revised Uniform Enforcement of Foreign Judgments Act; 9A Uniform Laws Annotated 488) to require that sister state judgment enforcement proceedings involving judgments for \$15,000 or less be filed in the appropriate municipal or justice court rather than the superior court.

*Origin:* The Lawyers' Club of San Francisco.

*Reference:* 9-31-81

*Ex-Com Liaison:* M. John Carson

*Final Action:* See Item 33

35. AB 3454 (Bates)  
*Psychotherapist/Patient Privilege: Holder Where Guardian of Conservator Appointed*

Amends Evidence Code Section 1013 to provide that where a guardian or conservator has been appointed for the patient, the patient is still holder of the privilege of proceedings involving the continued existence of the guardianship or conservatorship.

*Origin:* Bar Association of San Francisco

*Reference:* 9-34-81

*Ex-Com Liaison:* Thomas Smegal

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

36. AB 2635 (Farr) – Formerly SB 1944 (Sieroty)  
*Visitation Rights of Stepparents*

Amends Section 4351 of, and adds Section 4351.1 to the Civil Code to authorized the court in a proceeding under the Family Law Act to make orders with respect to visitation of minor stepchildren.

*Origin:* Western San Bernardino and San Diego County Bar Associations

*Reference:* 7-6-81

*Ex-Com Liaison:* Philip Hammer

*Final Action:* Chapter 1071, Statutes of 1982.

37. AB 2567 (Ingalls)  
*Unaccredited Law Schools*

Amends Section 6060 of and adds Article 3.5 to Chapter 4 of Division 3 of the Business and Professions Code and to repeal Chapter 3.5 of the Education Code to establish minimum statutory standards for unaccredited law schools and to eliminate after 1989 for purposes of qualifying for the general bar examination the study of law in law offices, judges chambers and correspondence schools.

*Origin:* AB 304 (1981)

*Final Action:* Failed passage in Assembly Judiciary Committee. Rereferred to Board Committee on Legislation.

THE STATE BAR OF CALIFORNIA  
 1210 K Street, Sacramento CA (916) 444-2762

Final Report of  
 Legislative  
 Representative

1982

CONFERENCE OF DELEGATES  
 LEGISLATIVE PROGRAM

SPONSORED ITEMS CATEGORY I

To Be Amended Into Bills of Others

38. Preliminary Mechanic's Lien Notice

Amends Section 3097 of the Civil Code to add the owner of real property as one given an estimate of the total price and a description of the labor, equipment and materials to be furnished in a proposed construction contract.



*Origin:* San Fernando Valley Bar Association.

*Reference:* 4-3-79

*Ex-Com Liaison:* Bert Tigerman

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

39. *Subdivision Map Act*

Amends Government Code Section 66424.1 to provide that a unit of land, or any portion thereof, may be subdivided more than one time pursuant to the provisions of the Subdivision Map Act prior to the completion of an equalized county assessment roll that reflects the creation of the unit to be subdivided.

*Origin:* Orange County Bar Association

*Reference:* 3-9-80

*Ex-Com Liaison:* Colin Wied

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

40. *SB 1108 (Speraw)*

*Zoning Appeals: 180 Day Statute of Limitations*

Amends Government Code Section 65907 to provide that the 180-day statute of limitations on actions challenging local administrative zoning decisions applies to charter cities.

*Origin:* National Lawyers Guild, Alameda County Lawyers Division

*Reference:* December 1980 Committee on the Environment Report. 5-19-80

*Ex-Com Liaison:* Christine Helwick

*Final Action:* Chapter 1426, Statutes of 1982

41. *Trusts: Compensation of Trustee's Advisors*

Adds Section 1122.1 to the Probate Code to permit trustees to pay attorneys, accountants and other advisors reasonable fees without prior court approval.

*Origin:* Los Angeles County Bar Association.

*Reference:* December 1980 Report, Estate Planning, Trust and Probate Section. 8-9-80

*Ex-Com Liaison:* Burt Tigerman

*Final Action:* Rereferred Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category I.

THE STATE BAR OF CALIFORNIA  
1210 K Street, Sacramento CA (916) 444-2762

Final Report of  
Legislative  
Representative

1982

CONFERENCE OF DELEGATES  
LEGISLATIVE PROGRAM

ENDORSED ITEMS CATEGORY II

42. *AB 629 (Kapiloff)*

*Increases Felony Bad Check & Grand Theft Threshold*

An act to amend Sections 476a, 484g, 484h and 487 of the Penal Code to increase the threshold amount for passing worthless checks to \$250, and to increase the minimum dollar amount for grand theft from \$200 to \$400.

*Origin:* Sacramento County Bar Association and San Diego County Bar Association.

*Reference:* Criminal Law Section Reports, February, 1979. 4-3 & 4-7-79 and 6-3 & 6-4-79

*Ex-Com Liaison:* Bert Tigerman

*Final Action:* Chapter 80, Statutes of 1982

43. *Workers' Comp: Increased Penalty for Delay in Payment*

Amends Labor Code Section 5814 to increase the penalty for unreasonable delay in payment of any workers' compensation award.

*Origin:* Lawyers' Club of Los Angeles County.

*Reference:* 3-10-80

*Ex-Com Liaison:* Colin Wied

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category II.

44. *AB 3618 (Kapiloff)*

*Withdrawal of Lis Pendens: Deletes Requirement of Dismissal of Underlying Cause of Action*

Amends Code of Civil Procedure Section 409.55 to delete requirement that agreement to withdraw lis pendens be accompanied by dismissal of underlying cause of action.

*Origin:* San Diego County Bar Association.

*Reference:* 3-1-81

*Ex-Com Liaison:* Christine Helwick

*Final Action:* Chapter 560, Statutes of 1982.

45. *AB 3552 (Robinson)*

*Unlawful Detainer: Damages on Lease Forfeiture*

Adds Section 1174.5 to the Code of Civil Procedure to provide that a tenant's liability for damages, if any, pursuant to Civil Code Section 1951.2 is not cut off by a judgment forfeiting the lease in an unlawful detainer action.

*Origin:* Orange County Bar Association.

*Reference:* 3-3-81

*Ex-Com Liaison:* Bert Tigerman

*Final Action:* Chapter 488, Statutes of 1982.

46. *SB 1998 (Watson)*

*Carnal Abuse: Sterilization of Certain Offenders*

Repeals Penal Code Section 645, which permits a court to order sterilization of a person found guilty of carnal abuse of a female under the age of 10.

*Origin:* Women Lawyers Association of Los Angeles

*Reference:* 5-4-81

*Ex-Com Liaison:* Philip Hammer

*Final Action:* Governor vetoed. Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category II.

47. *AB 3530 (Rosenthal)*

*Conservatorship: Substituted Judgment*

Amends Probate Code Section 2585 to provide that no person has any greater duty than does the conservator to propose actions involving substituted judgment specified in Probate Code Section 2580.

*Origin:* Beverly Hills Bar Association

*Reference:* 6-6-81

*Ex-Com Liaison:* Michael Blaylock

*Final Action:* Failed passage in Senate Judiciary Committee. Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category II.

48. *Custody Investigation: Availability of Reports to the Parties*

Adds Section 4602.1 to the Civil Code to provide that any report prepared pursuant to Civil Code Section 4602 must be furnished to the parties absent a court order to the contrary.

*Origin:* San Fernando Valley Bar Association.

*Reference:* 7-12-81

*Ex-Com Liaison:* Colin Wied

*Final Action:* Hold

49. *AB 3569 (Moore)*

*Domestic Violence: Duration, Termination, and Extension of Temporary Restraining Order*

Amends Code of Civil Procedure Section 548 to allow the court to determine on a case-by-case basis the appropriate duration of temporary restraining orders in cases of domestic violence; provides that such orders shall not exceed one year duration unless the parties agree otherwise.

*Origin:* Women Lawyers' Association of Los Angeles.

*Reference:* 7-18-81

*Ex-Com Liaison:* M. John Carson

*Final Action:* Chapter 359, Statutes of 1982

50. *AB 3607 (Moorhead)*

*Domestic Violence: Restitution to Providers of Related Services*

Amends Code of Civil Procedure Section 546 to allow courts to order perpetrators of domestic violence to make restitution to any individual or agency that provides services to the family or household member as a direct result of the abuse.

*Origin:* Women Lawyers' Association of Los Angeles.

*Reference:* 7-19-81

*Ex-Com Liaison:* M. John Carson

*Final Action:* Chapter 578, Statutes of 1982.

51. *AB 3607 (Moorhead)*

*Domestic Violence: Restitution for Psychological Care*

Amends Code of Civil Procedure Section 547 to allow courts to order perpetrators of domestic violence to make restitution to the family or household member for expenses for psychological care undertaken as a result of the abuse.

*Origin:* Women Lawyers' Association of Los Angeles.

*Reference:* 7-20-81

*Ex-Com Liaison:* M. John Carson

*Final Action:* Chapter 578, Statutes of 1982.

52. *AB 3689 (Ingalls)*

*Discovery: Expert Witnesses, Exchange of Information*

Amends Code of Civil Procedure Sections 2037, 2037.3 and 2037.5, amends and renumbers Section 2037.4 and adds a new Section 2037.4 to provide that the exchange of expert witness lists shall include expert witnesses' reports and writings and



to require expert witnesses to be made available for deposition.

*Origin:* Los Angeles County Bar Association

*Reference:* 9-22-81

*Ex-Com Liaison:* Thomas Smegal

*Final Action:* Chapter 1400, Statutes of 1982.

53. *AB 3689 (Ingalls)*

*Discovery: List of Expert Witnesses; Extending Time for Exchange*

Amends Code of Civil Procedure Section 2037.1 to provide that the party making a demand to exchange lists of expert witnesses has the same additional time within which to comply as does the party on whom the demand is made.

*Origin:* Los Angeles County Bar Association

*Reference:* 9-25-81

*Ex-Com Liaison:* Thomas Smegal

*Final Action:* Chapter 1400, Statutes of 1982.

54. *Minimum Automobile Insurance Requirements*

Amends Sections 16056, 16377, 16430, 16435, 16451, 16500 and 16550 of the Vehicle Code, Section 11622 of the Insurance Code and Section 3631 of the Public Utilities Code to specify that the minimum level of financial responsibility for every driver and owner of a motor vehicle in the event of personal injury, death or property damage shall be \$50,000/\$100,000 and \$15,000 rather than the current level of \$15,000/\$30,000 and \$5,000.

*Origin:* Orange County Bar Association

*Reference:* 2-10-81

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Placed on 1983 Legislative Program in Category II.

55. *AB 1029 (Levine)*

*Priority Persons Entitled to Letters: Estranged Spouse*

Amends Section 422 of the Probate Code. Provides that priority of a surviving estranged spouse as a person entitled to be granted letters of administration of the estate of a person dying intestate shall be lower than that of the heirs.

*Origin:* Beverly Hills Bar Association.

*Reference:* 5-1-79

*Ex-Com Liaison:* Michael Blaylock

*Final Action:* Rereferred to Executive Committee Conference of Delegates. Hold.

THE STATE BAR OF CALIFORNIA  
1210 K Street, Sacramento CA (916) 444-2762

Final Report of  
Legislative  
Representative

1983

TENTATIVE STATE BAR LEGISLATIVE PROGRAM

56. *Workers Compensation: Attorneys Fees Against Lien Claimant*

Amends Section 4903.2 of the Labor Code to permit the award of attorney fees against lien claimants.

*Origin:* Committee on Workers Compensation.

*Reference:* Report of Committee on Workers Compensation of April 15, 1982

*Board:* May 1, 1982 placed on Tentative Legislative Program.

57. *Exclusion of Condemnation Cases from Operation of the Lis Pendens Law*

Amends Code of Civil Procedure Section 409(b) and Code of Civil Procedure Section 1250.150 to exclude condemnation cases from operation of Lis Pendens law.

*Origin:* Condemnation Committee March 9, 1982.

*Reference:* Report of Board Committee of Legislation May, 1982 Board Meeting, Agenda 203.

*Board:* May, 1982 placed on Tentative Legislative Program.

58. *Amelioration of the Effect of Reduced Funding of California Legal Services Program*

Adds Sections 285.2, 285.3 and 285.4 of the Code of Civil Procedure to: (1) permit legal service attorneys to withdraw from a case when the agencies ability to service existing clients is impaired, (2) permit tolling or various limitations and procedural periods upon the withdrawal from representation by legal services attorneys, and (3) permit the court to appoint any lawyer or law firm to represent an indigent client without compensation on a showing of good cause.

*Origin:* The Committee on the Administration of Justice.

*Reference:* "The Report of the Committee on the Administration of Justice on Representation Problems Under Funding Cutbacks", March 2, 1982.

*Board:* March 6, 1982 placed on Tentative Legislative Program.

EXHIBIT B

HEMMING MORSE, INC.

Certified Public Accountants  
1700 South El Camino Real, San Mateo, California 94402

January 19, 1983

Board of Governors  
The State Bar of California

At your request, we have performed the procedures enumerated below with respect to actual costs expended during the ten-month period ended October 31, 1982 and the estimated costs for the two-month period ended December 31, 1982 by the State Bar of California, associated with the following:

- Lobbying the California State Legislature
- The Conference of Delegates Program

In addition, we have performed the procedures enumerated below with respect to costs expended by the State Bar of California, associated with the following activities performed during the period indicated:

- The submission of briefs amicus curiae for the year ended December 31, 1982
- President Anthony M. Murray's speaking program for the period October 26, 1982 to December 31, 1982
- The public information project entitled, "The Case For An Independent Judiciary" for the period September 12, 1982 to October 25, 1982

our examination was made solely to assist you in evaluating the reasonableness of those costs, and our report is

not to be used for any other purpose. The procedures we performed are summarized as follows:

- A. We examined the accounting controls relating to cash disbursements, cash receipts and payroll for the State Bar of California, and found there to be separation of duties and supervisor review of accounting work performed by employees.
- B. We compared revenues developed by the State Bar of California, relating to membership dues by class, related penalty charges and interest to the appropriate general ledger accounts as of October 31, 1982, and the 1982 budget, and verified allocations to each membership class.
- C. We compared actual costs and revenues for items described in B. and D. for the year ended December 31, 1981 to the 1981 budget to assure ourselves that amounts budgeted are, in fact, comparable to actual activity.
- D. We compared costs developed by the State Bar of California, relating to the Conference of Delegates Program and Legislative Affairs (Lobbying) to the appropriate general ledger accounts as of October 31, 1982 and the 1982 budget.
- E. We examined documentation supporting the costs developed by the State Bar of California, relating to the project entitled "The Case For An Independent Judiciary", speeches by President Anthony M. Murray and submitting briefs amicus curiae.
  - 1. Documentation examined included lists of hours worked by staff on the projects mentioned above and the appropriate hourly wage rate. We verified staff hours to individual time sheets and invoices and hourly wage rates to payroll registers.

Because the above agreed-upon procedures do not constitute an examination made in accordance with generally

accepted auditing standards, we do not express an audit opinion on the revenues collected and the costs expended during the appropriate time periods related to the areas mentioned above. However, no matters came to our attention that caused us to believe that adjustments might be required. Had we performed additional procedures or had we made an examination of the financial statements in accordance with generally accepted auditing standards, other matters might have come to our attention that would have been reported to you. This report relates only to the accounts and items specified above and does not extend to any financial statements of the State Bar of California, taken as a whole.

Our findings were in agreement with the accompanying schedules prepared by the State Bar of California. Schedule 1 is an analysis of membership revenues, penalties and interest by class, and Schedule 2 is the estimated costs for certain State Bar of California activities.

/s/ Hemming Morse, Inc.  
Accountants



THE STATE BAR OF CALIFORNIA  
ANALYSIS OF MEMBERSHIPS  
FOR THE YEAR ENDED DECEMBER 31, 1982

<u>Length of Membership</u>	<u>Membership Revenue By Class</u>	<u>Allocation of Penalty and Interest Revenue</u>	<u>Total Revenue By Class</u>	<u>% To Total</u>	<u># Member By Class</u>
<u>Active</u>					
Less Than 3 Years	\$ 1,684,235	\$121,180	\$ 1,805,415	14.6%	17,621
3 Years or More	9,691,110	698,860	10,389,970	84.3%	58,852
<u>Inactive</u>					
All Memberships	129,980	9,960	139,940	1.1%	6,499
<b>TOTAL REVENUE</b>	<b>\$11,505,325</b>	<b>\$830,000</b>	<b>\$12,335,325</b>	<b>100.0%</b>	<b>82,972</b>

196

THE STATE BAR OF CALIFORNIA  
ESTIMATED COSTS OF CERTAIN STATE BAR ACTIVITIES  
INCURRED DURING THE YEAR ENDED  
DECEMBER 31, 1982

Project Names	Note	Estimated Cost	Cost Per Member		
			Active With Membership Less than 3 Yrs.	Active With Membership 3 Yrs. or More	Inactive
JUDICIAL INDEPENDENCE	(1)	\$ 7,180	\$ .06	\$ .10	\$ .01
CONFERENCE OF DELEGATES	(2)	226,657	1.88	3.24	.38
LEGISLATIVE AFFAIRS	(3)	288,127	2.39	4.13	.49
AMICUS CURIAE BRIEFS	(4)	2,643	.02	.04	.00
PRESIDENTIAL OUTREACH	(5)	16,158	.13	.23	.03

197

**Effective Time Periods:**

- (1) For the period September 12, 1982 to October 25, 1982
- (2) Actual costs for the ten-month period ended October 31, 1982 and estimated costs for the two-month period ended December 31, 1982
- (3) Actual costs for the ten-month period ended October 31, 1982 and estimated costs for the two-month period ended December 31, 1982
- (4) For the year ended December 31, 1982
- (5) For the period October 26, 1982 to December 31, 1982

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

700 South Flower Street

Sixteenth Floor

Los Angeles, California 90017

Telephone: (213) 629-4200

HERBERT M. ROSENTHAL

TRUITT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

555 Franklin Street

San Francisco, California 94102

Telephone: (415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,

Petitioners and Plaintiffs,

v.

STATE BAR OF CALIFORNIA, a public  
corporation; ANTHONY M. MURRAY;  
PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA,  
JR.; GEOFFREY VAN LOUKS,  
THOMAS W. ERES; JOHN J. COO-  
TANZO; GEORGE W. COUCH, III;  
BURKE M. CRITCHFIELD; THOMAS  
R. DAVIS; DIXON Q. DERN; RUTH  
CHURCH GUPTA; DALE E. HANST;  
LEONARD HERR; ROBERT A. HINE;  
PHYLLIS M. HIX; MARTA MACIAS;  
PHILLIP SCHAFER; CRAIG A. SIL-  
BERMAN; DANIEL J. TOBIN; JAMES  
D. WARD; AND JOON HEE RHO,

Respondents and Defendants.

) CIV. NO. 307168

) DECLARATION

) OF

) MAGDALENE

) Y. O'ROURKE

) IN SUPPORT OF

) DEFENDANTS'

) OPPOSITION

) OF MOTION

) FOR PRELIMI-

) NARY INJUNC-

) TION

) DATE:

) January 28, 1983

) TIME: 9:00 A.M.

) DEPT.: 16

)

)

)

STATE OF CALIFORNIA

)

) SS

CITY AND COUNTY OF SAN FRANCISCO

)

1. I am, and since June 25, 1976 have continuously been, an active member of the State Bar of California. I have been employed as an attorney in the Office of General Counsel of the State Bar of California since July, 1978. In that capacity my responsibilities include giving advice and counsel to the Board of Governors and the staff on a wide variety of matters and representing the State Bar in state and federal courts.

2. I am personally familiar with the overall operation, activities and programs of the State Bar and particularly familiar with activities related to lobbying and communications.

3. Information contained in paragraphs 4 through 9 of this declaration is based on my own personal knowledge and Exhibits 1 and 2. Information contained in paragraphs 5 through 53 is based on my personal research of State Bar Journals, Exhibits 8, 9, and 10, and Gilb Corinne, *Self-Regulating Professions and the Public Welfare, A Case Study of the California Bar*, dissertation presented for the Ph.D. in American Civilization, Radcliffe College, May 1956.

*Present Activities of the State Bar - The Status Quo*

4. The State Bar is at the present time performing numerous activities which fall into broad categories in which the State Bar has continually functioned since its creation in 1927. The broad categories are: admissions,

enforcing professional standards and enhancing competence, improving the administration of justice and advancement of the science of jurisprudence, supporting legal services delivery and access, and providing member services.

5. In matters of admission of applicants for licenses to practice law in California, the State Bar acts as an arm of the California Supreme Court. Accreditation of law schools is another State Bar activity in the category of admissions.

6. Some of the activities included in the category of enforcing professional standards and enhancing competence are: acting as an arm of the California Supreme Court in matters of discipline; certification of Practical Training of Law Students; development and revision of the Rules of Professional Conduct; providing ethics opinions and an ethics hotline; enforcement in the area of unauthorized practice of law; administering the Client Security Fund, mandatory fee arbitration; continuing education and specialization certification.

7. The category of improving the administration of justice and advancing the science of jurisprudence includes the following activities: review study, and recommendation on numerous pieces of legislation by State Bar sections and committees, and the Conference of Delegates; sponsorship of legislative measures; maintains a legislative representatives' office staffed by full time professional lobbyists in Sacramento; provides assistance to the Judicial Council on proposed rule changes and legislative measures related to Court reform and other matters; and provides assistance to the Law Revision

Commission, pursuant to statute, in studying, drafting, and making recommendations related to law reform; provides to the Governor, on an informal basis upon request, evaluations and advice on proposed legislation; assists the Governor, pursuant to statute, in the judicial appointment process by providing for evaluation and recommendations on judicial nominees by the 25-member Commission on Judicial Nominees Evaluation, all of whom are appointed by the Board of Governors of the State Bar; and provides information to the bar and the public for the purpose of education regarding the legal profession and the legal system. The State Bar continues its constitutional duties of appointing four members of the Judicial Council and appointing two members of the Commission on Judicial Qualifications.

8. Activities included in the category of supporting legal services delivery and access are: serving as an information clearing house, conducting workshops, providing minimum standards for lawyer referral services; and assistance to the private bar in developing voluntary legal services programs.

9. Included in membership services are activities such as the annual meeting; programs of Sections in 11 substantive areas of law; publication and information programs; group insurance; certifying and registering law corporations; participation through local bar associations in the Conference of Delegates; (See Exhibit 7.) participation in activities of 22 standing committees; and special liaison activities with local bars. (For detailed discussion of present activities, see Exhibits 1 and 2.)



### *Creation of the State Bar*

10. The State Bar of California was created as a public corporation with enactment by the Legislature of the State Bar Act (Stats. 1927, p.38) which became effective July 29, 1927.

11. The State Bar Act became law as a result of a generally recognized need for a public body to enhance the public's confidence in the legal profession and the legal system by systematically regulating the admission and discipline of attorneys and improving the administration of justice.

12. From its inception the work of the State Bar in the areas of admissions, discipline and the administration of justice has been undertaken as a public service that an integrated bar authorized statute is uniquely qualified to undertake.

### *Activities of the State Bar in the 1920's*

13. Within the first year of the State Bar's existence (a) Rules of Procedure for the effective processing and consideration of complaints against attorneys were adopted; (b) Rules of Professional Conduct were adopted for Supreme Court approval in order to establish high standards of attorney behavior; and (c) Rules Regulating Admission to Practice Law were adopted setting new standards for admission in order to better protect the public from those unqualified or unfit to practice law.

14. During the State Bar's first year of existence, members organized five major sections and commenced

work. The sections were: Civil Procedure, Criminal Law and Procedure, Courts and Judicial Officers, Regulatory Commissions, and Professional Conduct.

15. The section reports at the first annual meeting in 1928 show that the Sections studied and made recommendations on a wide variety of topics, including judicial selection and conduct. The Section on Courts and Judicial Officers specifically recommended that the Bar support adoption of what was known as the "Commonwealth Plan" for selection of judges. That plan was subsequently proposed as a Constitutional amendment.

16. In addition to the Sections, a number of committees were formed to assist in law reform. They also began their work and reported at the first annual meeting.

17. The effective delivery of legal services to indigents and to persons of moderate means was immediately identified as a matter of vital concern to the State Bar in the area of law reform. The Legal Aid Committee was formed in 1928 and it encouraged and fostered, working through local bar associations, the creation of local legal aid committees and panels of attorneys in each community. Many such panels were established to provide free legal services for individuals in the lower middle class.

18. Other committees that were formed and made recommendations and reports in 1928 include the Committee on Constitutional Amendments and the Committee on Revision of the Corporation Laws. The work of the latter Committee would in 1931 ultimately result in the Legislature enacting a complete revision of the corporation laws in California for the first time in 50 years.

19. State Bar lobbying was done during the early years by volunteers. In 1929 a State Bar committee first recommended that the State Bar maintain a paid lobbyist in Sacramento during sessions of the Legislature for the purpose of assisting the members of the Legislature in safeguarding the interests of the people in all matters which concern The State Bar of California. That recommendation was not immediately acted upon.

*Activities of the State Bar in the 1930's*

20. As a result of State Bar investigation and recommendation the State Bar Act was amended in 1931 to proscribe ambulance chasing, running and capping (Stats. 1931, ch. 1043, p. 2198; Bus. and Prof. Code sec. 6150 et seq.)

21. Public confidence in the profession was eroded by extensive practice of law by unlicensed corporations and persons. Early in the 1930's vigorous efforts and activities were begun to enforce the unauthorized practice of law provisions of the State Bar Act.

22. By the beginning of the 1930's the Section Department of the State Bar had been developed. The Section Department appears in form and operation to be the forerunner of the Conference of Delegates which came into existence in 1934.

23. The 1933 report of The Committee on Legislation was the real genesis of the Conference of Delegates. The Board of Governors at its April 1934 meeting approved changes in its rules and created the Conference of Bar Association Delegates.

24. During the early 1930's the need for paid lobbyists to be present in Sacramento during legislative sessions continued. That need was acknowledged by both the State Bar Committee on Legislation and members of the Legislature, not only for State Bar measures but to assure that the expertise of the organized bar was available to the Legislature on measures of interest to the bar and the public generally. By the late 1930's in addition to volunteers the Secretary of the State Bar served as lobbyist.

25. Cooperation between the State Bar and the Judicial Council in the area of administration of justice began in the 1930's. It continues to the present time and the Board of Governors now appoints four members of the Judicial Council.

26. In 1931, the State Bar's first public education program came into being when the Board of Governors appointed the Statewide Committee of Fifteen. The purpose of the program was to educate lawyers with respect to their responsibilities to the public and educate the public as to the functions of the profession and the legal system. The program was carried out through the news media speakers bureaus, publications, State Bar committees and local bars.

27. In 1933 the first Committee on the Administration of Justice was formed for the purpose of coordinating State Bar activities in this area.

*Activities of the State Bar in the 1940's*

28. The work of the State Bar which was begun in the 1930's continued and was expanded during the 1940's.

29. The State Bar continued and expanded its cooperation with and assistance to the Judicial Council in the area of the administration. Together, the State Bar and the Judicial Council studied and redrafted the rules governing appellate procedures; sponsored legislation designed to give the Judicial Council power to prescribe rules for appellate procedure in civil and criminal cases; worked on completing new rules of appellate procedure; conducted an intensive study for reforming and reorganizing the existing lower court structure and revising article VI of the California Constitution.

30. Among other matters relating to the administration of justice, the State Bar performed a leadership role in the modernization of the law relating to survival of tort actions and achieved all of its major goals in supporting the enactment of the California Administrative Procedure Act in 1947 following nearly ten years of State Bar study and recommendations.

31. With the commencement of the American involvement in the Second World War, the State Bar took an active part in assisting with the United States' war effort. At the request of the U.S. Navy, the State Bar organized a speaker's bureau to encourage enlistment of volunteers. The State bar, in cooperation with local bar associations, organized over 300 speakers throughout California.

32. Additionally, pursuant to the State Bar's war assistance program, large numbers of California attorneys rendered free legal advice and assistance to military personnel and their dependents under the provisions of the Soldiers' and Sailors' Civil Relief Act. The State Bar also assisted Civil Defense officials in surveying ordinances and regulations relating to civil defense in all California municipalities as a basis for reorganizing California's defenses. The American Bar Association awarded The State Bar of California its Award of Merit in 1942 in recognition of the State Bar's war assistance program.

33. In January 1943, Governor Warren requested the assistance of the State Bar in evaluating proposed appointees to Municipal or Superior Court vacancies to determine whether there was anything in the character, training, experience or professional conduct of the appointee which would militate against the appointment. The State Bar accepted that responsibility and has since continually performed that function.

34. Governor Warren also sought the assistance of the State Bar in 1943 in expanding the role of the Commission on Judicial Appointments (formerly called the Commission on Judicial Qualifications) to include all judges as opposed to only Supreme Court and Court of Appeals justices. The State Bar responded by appointing a Committee on Selection, Qualification, Tenure and Removal of Judges which proposed amendments to section 26 of article VI of the California Constitution relating to the Commission on Judicial Appointments which would, among other things, increase the size of the Commission, increase the number of votes necessary for confirmation of an appointment and require that all



appointments to the Municipal and Superior Court be confirmed by the Commission.

*Activities of the State Bar in the 1950's*

35. In response to the widespread public dissatisfaction with trial court delays and the inefficiency of the system of administration of justice, the State Bar, along with the Judicial Council, undertook and co-sponsored the first major court reorganization in California, studying and sponsoring changes in (a) trial court procedure and practice, (b) the structure and work of the trial courts, including the elimination of the police courts which had come under great criticism in their operations, (c) completion of the revision of appellate court procedure, and (d) completion of the revision of criminal law and procedure. This joint project also remains as California's last major court reorganization. It was possible because of the continued cooperation between the State Bar and the Judicial Council with the support of local bar groups.

36. In other major activities relating to the administration of justice, the State Bar played an integral role in the creation of the California Law Revision Commission which replaced the Code Commission in 1953.

37. The State Bar also intensified its examination of the effective delivery of legal services in the 1950's. The State Bar's Committee on Legal Aid and Lawyer Reference Services worked with local bar associations in encouraging the adoption and expansion of local legal aid facilities and the establishment of lawyer reference services throughout the State. Working with the Committee

on Legal Aid and Lawyer Reference Services, the Board of Governors considered rules and forms for lawyer reference plans and approved outlines of addresses on lawyer reference plans and legal aid facilities which were made available to speakers for use in acquainting the public with the necessity of making voluntary legal services available to everyone at moderate cost and without cost to the poor. During the 1950's the State Bar also undertook studies into methods of effectively delivering legal services to the middle class. As will be seen later, these studies resulted in proposal and rules which fostered and encouraged group legal service plans in California.

38. In 1959 a special study committee appointed by the Board first recommended the establishment of a client security fund to be funded by membership dues. Legislation to provide for the establishment of the Client Security fund was enacted in 1971 (Stats. 1971, ch. 1338, Bus. & Prof. Code sec. 6140.5 et seq.)

*Activities of the Bar in the 1960's and 1970's*

39. By 1960 the extensive efforts and work of the State Bar in the areas of judicial selection and tenure, as in other areas was well recognized. That work included extensive cooperation with the Judicial Council, studying, drafting and sponsoring legislation and informing and educating the bar and the public with respect to selection and tenure.

40. New impetus was given to State Bar activity in this area with the approval by the California voters of

Proposition 10 in the November, 1960 election. Proposition 10 amended Article VI, the judicial article of the California Constitution by creating a new Commission on Judicial Qualifications to supersede the Commission on Qualifications. The powers of the Commission were increased and the number of members of the Commission was expended from three to eleven, including two members to be appointed by the Board of Governors of the State Bar. Proposition 10 also augmented the membership of the Judicial Council to include four members to be appointed by the Board of Governors. (See Exhibit 8.)

41. Since Proposition 10 gave the State Bar constitutional duties to perform, it also made the State Bar a constitutional agency in the judicial branch of government. (See Exhibit 8.)

42. In 1966 the voters of California approved a revision of the California Constitution, including Article VI. That revision made no substantive change with the provisions related to the State Bar. (See Exhibits 9 and 10.)

43. The State Bar remained active in the 1960's and 1970's in providing assistance to the Legislature, the Judicial Council and the Law Revision Commission on matters relating to the administration of justice. The State Bar was instrumental in the adoption of new pre-trial procedure rules, the adoption of the Uniform Commercial Code, the Evidence Code, and the most recent comprehensive revision of the Corporation Code.

44. State Bar proposals resulted in the reform of the system of appointing inheritance tax appraisers and in providing for their selection on merit and competitive examination.

45. The State Bar co-sponsored with the Judicial Council the initial enactment permitting arbitration as an alternative to court trial in superior court cases and assisted the Judicial Council in implementing the system of arbitration. Subsequently, the State Bar supported improvements in the Arbitration Act and was directed by the Legislature to prepare and adopt rules for the selection of arbitrators in civil cases.

46. In 1967, the Senate supported the "Merit Plan for the Selection of California Judges" which had been formulated and sponsored by the State Bar with the assistance of the Judicial Council and the Governor's office. The State Bar also formulated and sponsored proposals for changing the composition of the Commission on Judicial Appointments to include non-lawyers as well as lawyers and judges and to improve the Commission's ability to investigate gubernatorial nominees.

47. During the 1960's and 1970's, the State Bar, in cooperation with the Judicial Council, drafted and sponsored revisions in the code of Civil Procedure regarding procedures on appeal, the bases for jurisdiction and service of process, and adoption of the Family Law Act and revisions in family law rules and forms.

48. The State Bar was instrumental in procuring the enactment of the Civil Discovery Act, and, in cooperation with the Attorney General and others, studied and supported amendments to the Administrative Procedures Act regarding discovery in administrative proceedings. The State bar also made numerous studies and recommendations concerning pre-trial detention and release (bail reform).

49. in 1972, upon State Bar recommendation, the Supreme Court adopted rule 983 of the California Rules of Court pertaining to counsel pro hac vice to make attorneys who are permitted to appear as counsel pro hac vice subject to the jurisdiction of California courts and the disciplinary jurisdiction of the State Bar with respect to any acts of such attorney occurring in the course of his appearance. Additionally, the Supreme Court charged the State Bar with the duty of monitoring such activities by requiring persons desiring to appear as counsel pro hac vice to serve a copy of the application on the State Bar.

50. Following several years of consideration by the Board of Governors and the Committee of Bar Examiners, the Board adopted "Rules for the Practical Training of Law Students" in January 1970. The goal of these rules is to provide law students with the practical training which will enable them to better serve the public when they are in fact admitted to practice.

51. As a result of the work of several special committees appointed by the Board of Governors which commenced in the late 1950's, the Board of Governors adopted and the Supreme Court approved rule 20 of the Rules of Professional Conduct (present rule 2-104) in 1970 to foster and encourage the formation and participation by attorneys in group legal service plans. According to reports filed with the State Bar, by mid-1976 there were more than a thousand group legal service arrangements operating in California. The State Bar also adopted and the Supreme Court approved rule 23 of the Rules of Professional Conduct (present rule 2-104) to encourage plans for prepaid legal services.

52. Additionally, the State Bar further expanded its activities in encouraging the establishment of lawyer reference services by community groups in addition to local bar associations.

53. In an effort to reduce the costs of legal services, the State Bar also studied and proposed legislation for the training, education and certification of legal assistants.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on January 21, 1983 at San Francisco, California.

/s/ Magdalene Y. O'Rourke  
Magdalene Y. O'Rourke

---



NOV 15 1989

JOSEPH F. SPANIO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M.  
KINTER; DAVID LAMPE; GARRETT BEAUMONT;  
CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.;  
J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER;  
THOMAS HUNTER RUSSELL; NANCY L. SWEET;  
MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON;  
THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C.  
MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and  
A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN  
LOUKS; THOMAS W. ERES; JOHN H. COSTANZO;  
GEORGE W. COUCH, III; BURKE M. CRITCHFIELD;  
THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH  
GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A.  
HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A.  
SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and  
JOON HEE RHO,

*Respondents.*

On Writ of Certiorari in the Supreme Court of California

**JOINT APPENDIX  
VOLUME II**

HERBERT M. ROSENTHAL  
\*DIANE C. YU  
\*Counsel of Record  
555 Franklin Street  
San Francisco, CA 94102  
(415) 561-8200  
*Attorneys for Respondents*  
(Additional Counsel listed  
on inside cover)

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
\*ANTHONY T. CASO  
\*Counsel of Record  
PACIFIC LEGAL FOUNDATION  
2700 Gateway Oaks Drive, Suite 200  
Sacramento, CA 95833  
Telephone: (916) 641-8888  
*Attorneys for Petitioners*

**Petition for Certiorari filed May 24, 1989.  
Certiorari granted October 2, 1989.**

HUFSTEDLER, MILLER, KAUS  
& BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

JUDITH R. STARR

355 South Grand Avenue

45th Floor

Los Angeles, CA 90017

(213) 617-7070

*Attorneys for Respondents*

## TABLE OF CONTENTS

Page

## VOLUME I

Chronological List of Relevant Docket Entries.....	1
Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief .....	2
Amendment to Petition for Writ of Mandate and Com- plaint for Declaratory and Injunctive Relief .....	27
Second Amendment to Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief .....	31
Answer .....	35
Memorandum of Points and Authorities in Opposi- tion to Motion for Preliminary Injunction.....	40
Exhibit 2 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction .....	75
Exhibit 5 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction .....	126
Declaration of Mary G. Wailes in Support of Defen- dants' Opposition of Motion for Preliminary Injunction.....	155
Declaration of Magdelene Y. O'Rourke in Support of Defendants' Opposition of Motion for Preliminary Injunction.....	198

## VOLUME II

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction-Errata .....	214
First Amended Answer (C.C.P. § 472).....	216



## TABLE OF CONTENTS - Continued

	Page
Order Denying Preliminary Injunction and Dissolving Temporary Restraining Order.....	222
Second Amended Answer .....	225
Declarations in Support of Motion for Summary Judgment .....	232
Index to Attachments to Motion for Partial Summary Judgment .....	234
VOLUME III	
Supplemental Points and Authorities in Support of Defendants' Motion for Summary Judgment and [Defendants'] Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment .....	433
Supplemental Declarations in Support of Defendants' Motion for Summary Judgment.....	436
Notice of Correction of Defendants' Supplemental Declarations in Support of Defendants' Motion for Summary Judgment .....	470
Opening of Superior Court .....	477
Opinion of the Court of Appeal, Third Appellate District .....	480
Reply Brief on the Merits of Defendants/Respondents/Appellees.....	537
Opinion of the California Supreme Court .....	556

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY

ROBERT S. THOMPSON

STANLEY H. WILLIAMS

LAURIE D. ZELON

MARY E. HEALY

700 South Flower Street

Sixteenth Floor

Los Angeles, California 90017

(213) 629-4200

HERBERT M. ROSENTHAL

TRUIT A. RACHEY, JR.

MAGDALENE Y. O'ROURKE

555 Franklin Street

San Francisco, California 94102

(415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	) CIV. NO. 307168
Petitioners and Plaintiffs,	)
v.	) MEMORAN-
STATE BAR OF CALIFORNIA, a public	) D U M O F
corporation; ANTHONY M. MURRAY;	) POINTS AND
PATRICIA GREENE; GIRT K.	) AUTHORITIES
HIRSCHBERG, LELAND R. SELNA, JR.;	) IN OPPOSITION
GEOFFREY VAN LOUKS; THOMAS W.	) TO MOTION
ERES; JOHN J. COSTANZA; GEORGE W.	) FOR PRELIMI-
COUCH, III; BURKE M. CRITCHFIELD;	) NARY INJUNC-
THOMAS R. DAVIS; DIXON Q. DERN;	) TION - ERRATA
RUTH CHURCH GUPTA; DALE E.	) (Filed Jan. 27,
HANST; LEONARD HERR; ROBERT A.	) 1983)
HINE; PHYLLIS M. HIX; MARTA	) DATE:
MACIAS; PHILLIP SCHAFER; CRAIG A.	) January 28, 1983
SILBERMAN; DANIEL J. TOBIN; JAMES	) TIME: 9:00 A.M.
D. WARD; AND JOON HEE RHO,	) DEPT.: 16
Respondents and Defendants.	)

1. Page 16, line 22 – "same analysis permit" should be "same analysis to permit."
2. Page 19, lines 16-18 – delete first sentence of paragraph and insert the following footnote at the end of line 20:  
  
The Declaration of Magdalene Y. O'Rourke in support of this Memorandum sets forth reasons for the original enactment."
3. Page 21, line 24 – delete "retention."
4. Page 22, line 20 – the word "legislation" should be "legislative authorization."

DATED: January 25, 1983

Respectfully submitted,

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
STANLEY H. WILLIAMS  
LAURIE D. ZELON  
MARY E. HEALY

By /s/ Mary E. Healy  
Mary E. Healy  
Attorneys for Defendants

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street  
Sixteenth Floor  
Los Angeles, California 90017  
Telephone: (213) 629-4200  
  
HERBERT M. ROSENTHAL  
TRUIT A. RACHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, California 94102  
Telephone: (415) 561-8200  
Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	) Civ. No. 307168
Petitioners and Plaintiffs,	) FIRST
	) AMENDED
v.	) ANSWER
STATE BAR OF CALIFORNIA, a public	) (C.C.P. § 472)
corporation; ANTHONY M. MURRAY;	) (Filed Feb. 4,
PATRICIA GREENE; GIRT K.	) 1983)
HIRSCHBERG; LELAND R. SELNA,	)
JR.; GEOFFREY VAN LOUKS;	)
THOMAS W. ERES; JOHN J. COS-	)
TANZO; GEORGE W. COUCH, III;	)
BURKE M. CRITCHFIELD; THOMAS	)
R. DAVIS; DIXON Q. DERN; RUTH	)
CHURCH GUPTA; DALE E. HANST;	)
LEONARD HERR; ROBERT A. HINE;	)
PHYLLIS M. HIX; MARTA MACIAS;	)
PHILLIP SCHAFER; CRAIG A. SIL-	)
BERMAN; DANIEL J. TOBIN; JAMES	)
D. WARD; AND JOON HEE RHO,	)
Respondents and Defendants.	)

Pursuant to Code of Civil Procedure § 472, defendants (with the exception of defendant, Phyllis M. Hix), for their First Amended Answer allege as follows:

1. Defendants admit the allegations of Paragraph 1 of the Complaint, except that defendants deny that any expenditures are being made for political and ideological purposes in violation of petitioners' and plaintiffs' constitutional rights to freedom of speech and association.

2. Defendants lack sufficient information or belief to enable them to admit or deny plaintiffs' allegations that they will continue to pay dues to the State Bar as required by law. On the basis of this lack of information and belief, defendants deny such allegations. Except as so denied herein, defendants admit the allegations of Paragraphs 2 of the Complaint.

3. Defendants admit the allegations of Paragraph 3 of the Complaint.

4. Defendants admit the allegations of Paragraph 4 of the Complaint.

5. In response to the allegations of Paragraph 5 of the Complaint, defendants allege that the provisions of the California Constitution, and the Business and Professions Code, speak for themselves, and that basic membership dues for the State Bar are as set by the legislature. Except as so alleged, defendants deny, generally and specifically, each and every allegation of Paragraph 5 of the Complaint.

6. Defendants admit that the State Bar of California has expended revenues for lobbying, the submission of

briefs *amicus curiae*, financing meetings for the Conference of Delegates, publicizing the speeches of the President of the State Bar, and financing a public information project on the judiciary. Except as so admitted, defendants deny, generally and specifically, each and every allegation of Paragraph 6 of the Complaint.

7. Defendants have no information or belief sufficient to enable them to respond to the allegations of Paragraph 7 of the Complaint, and on that basis deny, generally and specifically, each and every allegation of Paragraph 7.

8. Defendants deny generally and specifically each and every allegation of Paragraph 8 of the Complaint.

9. Defendants deny generally and specifically each and every allegation of Paragraph 9 of the Complaint.

10. Defendants deny generally and specifically each and every allegation of Paragraph 10 of the Complaint. Defendants further deny, generally and specifically, that petitioners and plaintiffs are entitled to the remedies sought herein, or to any remedy at all.

#### *FIRST FURTHER AND SEPARATE DEFENSE*

11. Plaintiffs have failed to state a cause of action upon which relief can be granted.

#### *SECOND FURTHER AND SEPARATE DEFENSE*

12. Plaintiffs have been members of the State Bar of California for a significant time and for some time have



been familiar with the activities and programs of the State Bar, including those complained of in this suit.

13. Despite their knowledge of State Bar activities, the plaintiffs waited until Fall of 1982 to institute this suit and to apprise the State Bar of their objections to State Bar programs. While plaintiffs have not alleged with specificity any of the particular activities to which they object, all of the programs complained of in this suit have been conducted by the State Bar for a number of years.

14. Plaintiffs' delay in instituting this suit, and particularly their actions in waiting until after the Legislature had completed its consideration of the 1983 State Bar fees bill will result in prejudice to the defendant State Bar in that without knowledge of plaintiffs' objections and with legislative authorization, the State Bar has committed itself to support a number of programs, has expended sums for planning and administration of these programs, has entered into contracts with employees to further its programs, and has expended sums for program costs already incurred.

15. By virtue of the foregoing, plaintiffs are barred from seeking equitable relief by the doctrine of laches.

#### *THIRD FURTHER AND SEPARATE DEFENSE*

16. Defendants incorporate by reference as if set forth herein in full each and every allegation of Paragraphs 12 through 14 above.

17. Plaintiffs' actions in bringing the suit herein are designed to promote plaintiffs' own personal, private interests by attempting to interfere with legitimate and

legislatively authorized governmental activities and to impose an unlawful prior restraint on the expression and association of defendants and of members of the State Bar with whom plaintiffs disagree. By virtue of the foregoing, the plaintiffs are barred from equitable relief herein by the doctrine of unclean hands.

#### *FOURTH FURTHER AND SEPARATE DEFENSE*

18. Defendants incorporate as if set forth in full herein each and every allegation set forth in Paragraphs 12 through 14 above. By virtue of the foregoing, plaintiffs have waived any possible claims against defendants and plaintiffs are estopped and barred from claiming any rights to equitable relief.

#### *FIFTH FURTHER AND SEPARATE DEFENSE*

19. Defendants' actions are privileged and protected under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 2 of the California Constitution. Defendants are further privileged in that all actions complained of in plaintiffs' Complaint were undertaken pursuant to legislative authorization and in good faith by defendants while they served as members of the Board of Governors of the State Bar, a governmental entity.

WHEREFORE, these answering defendants pray that:

1. The relief sought by the Petition and Complaint be denied;

2. Defendants be permitted to recover from plaintiffs their costs of this suit, including their reasonable attorneys' fees, and

3. The Court grant defendants such other and further relief as it deems just and proper.

DATED: February 3, 1983.

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY

HERBERT M. ROSENTHAL  
TRUIT A. RACHEY, JR.  
MAGDALENE Y. O'ROURKE

By /s/ Mary E. Healy  
Mary E. Healy  
Attorneys for Defendants

IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	) NO. 307168 DEPT. 16
Petitioners & Plaintiffs,	)
vs.	) ORDER DENYING
STATE BAR OF CALIFORNIA,	) PRELIMINARY
et al.,	) INJUNCTION AND
Respondents & Defendants.	) DISSOLVING
	) TEMPORARY
	) RESTRAINING
	) ORDER
	) (Filed MAR 4 1983)

The motion of petitioners and plaintiffs for a preliminary injunction came on regularly for hearing by the Court on January 28, 1983, pursuant to an order to show cause issued by this Court on October 26, 1982, and the order continuing the hearing on the motion issued by this Court on December 2, 1982. Plaintiffs and petitioners appeared by counsel Anthony T. Caso of the Pacific Legal Foundation. Defendants and respondents appeared by counsel Robert S. Thompson of Hufstedler, Miller, Carlson & Beardsley. Counsel Michael Rubin of Altshuler and Berzon appeared on behalf of the Bar Association of San Francisco and the Lawyers Club of San Francisco as amici curiae in support of defendants and respondents.

The showing by plaintiffs appears to the Court to indicate that upon trial it is unlikely that they will prevail in obtaining injunctive relief coterminous with their request. The California Constitution and statutes appear to authorize the current activities of defendant leaving only the issues of the United States Constitution as raised

by *Abood v. Detroit Board of Education* (1977) 431 U.S. 209; 97 S.Ct. 1782 to be raised at trial. In other words, it appears unlikely the plaintiffs will be able to prohibit the "political" or "ideological" activities of the State Bar and/or the Board of Bar Governors in toto. To so rule would, while protecting the freedom of speech of plaintiff, deny the same right of the rest of the members of the State Bar who do not so object to those activities. The *Abood* case talks not of the power of the defendant entity to speak, but of using the dues of objecting members to finance speech they disagree with.

Without expressing an opinion on whether *Abood* controls here, to issue a preliminary injunction per *Abood* will necessitate the determination with specificity which activities of the State Bar are "political" or ideological" and which are germane to the legitimate pursuits of the State Bar assigned to it by law. These determinations should wait trial. It is impossible, even if it be found at this point that *Abood* controls, to determine the above issues with accuracy and to determine the portions of dues attributable to the support of each of them sufficient to frame a proper order.

The Court further feels that with the lengthy background of this defendant's activities, going back years, the ordinary course of the early part of a legislative session, and the lack of imminent judicial elections, it is difficult to find "irreparable injury" to plaintiffs. The State Bar is pursuing for now the traditional activities they have engaged in for many years. The results of this challenge should await a full hearing. The elections are now over and the need for the temporary restraining order is past.

IT IS HEREBY ORDERED that the temporary restraining order of October 26, 1982, is dissolved, and the motion for preliminary injunction is denied.

DATED: MAR 4 1983

/s/ FRED W. MARLER JR.  
JUDGE OF THE SUPERIOR COURT

---



HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
 ROBERT S. THOMPSON  
 LAURIE D. ZELON  
 MARY E. HEALY  
 700 South Flower Street  
 Sixteenth Floor  
 Los Angeles, California 90017  
 Telephone: 213/629-4200  
 HERBERT M. ROSENTHAL  
 TRUITT A. RICHEY, Jr.  
 MAGDALENE Y. O'ROURKE  
 555 Franklin Street  
 San Francisco, California 94102  
 Telephone: 415/561-8200

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	
Petitioners and Plaintiffs,	)	
v.	)	
STATE BAR OF CALIFORNIA, a	)	
public corporation; ANTHONY M.	)	
MURRAY; PATRICIA GREENE; GIRT	)	
K. HIRSCHBERG; LELAND R. SELNA,	)	
Jr.; GEOFFREY VAN LOUCKS;	)	Civ. No. 307168
THOMAS W. ERES; JOHN J.	)	
COSTANZO; GEORGE W. COUCH, III;	)	SECOND
BURKE M. CRITCHFIELD; THOMAS	)	AMENDED
R. DAVIS; DIXON Q. DERN; RUTH	)	ANSWER
CHURCH GUPTA; DALE E. HANST;	)	
LEONARD HERR; ROBERT A. HINE;	)	
PHYLLIS M. HIX; MARTA MACIAS;	)	
PHILLIP SCHAFER; CRAIG A.	)	
SILBERMAN; DANIEL J. TOBIN;	)	
JAMES D. WARD; and JOON HEE	)	
RHO,	)	
Respondents and Defendants.	)	

For their Second Amended Answer, defendants (with the exception of defendant, Phyllis M. Hix), allege as follows:

1. Defendants admit the allegations of Paragraph 1 of the Complaint except that defendants deny that any expenditures are being made for political and ideological purposes in violation of petitioners' and plaintiffs' constitutional rights to freedom of speech and association.
2. Defendants lack sufficient information or belief to enable them to admit or deny plaintiffs' allegations that they will continue to pay dues to the State Bar as required by law. On the basis of this lack of information and belief, defendants deny such allegations. Except as so denied herein, defendants admit the allegations of Paragraph 2 of the Complaint.
3. Defendants admit the allegations of Paragraph 3 of the Complaint.
4. Defendants admit the allegations of Paragraph 4 of the Complaint.
5. In response to the allegations of Paragraph 5 of the Complaint, defendants allege that the provisions of the California Constitution, and the Business and Professions Code, speak for themselves, and that basic membership dues for the State Bar are as set by the Legislature. Except as so alleged, defendants deny, generally and specifically, each and every allegation of Paragraph 5 of the Complaint.
6. Defendants admit that The State Bar of California has expended revenues for lobbying, the submission of briefs *amicus curiae*, financing meetings of the Conference of

Delegates, publicizing the speeches of the President of the State Bar, and financing a public information project on the judiciary. Except as so admitted, defendants deny, generally and specifically, each and every allegation of Paragraph 6 of the Complaint.

7. Defendants have no information or belief sufficient to enable them to respond to the allegations of Paragraph 7 of the Complaint, and on that basis deny, generally and specifically, each and every allegation of Paragraph 7.

8. Defendants deny generally and specifically each and every allegation of Paragraph 8 of the Complaint.

9. Defendants deny generally and specifically each and every allegation of Paragraph 9 of the Complaint.

10. Defendants deny generally and specifically each and every allegation of Paragraph 10 of the Complaint. Defendants further deny, generally and specifically, that petitioners and plaintiffs are entitled to the remedies sought herein, or to any remedy at all.

#### *FIRST FURTHER AND SEPARATE DEFENSE*

11. Plaintiffs have failed to state a cause of action upon which relief can be granted.

#### *SECOND FURTHER AND SEPARATE DEFENSE*

12. Plaintiffs have been members of The State Bar of California for a significant time and for some time have been familiar with the activities and programs of the State Bar, including those complained of in this suit.

13. Despite their knowledge of State Bar activities, the plaintiffs waited until fall of 1982 to institute this suit and to apprise the State Bar of their objections to State Bar programs. While plaintiffs have not alleged with specificity any of the particular activities to which they object, all of the programs complained of in this suit have been conducted by the State Bar for a number of years.

14. Plaintiffs' delay in instituting this suit, and particularly their actions in waiting until after the Legislature had completed its consideration of the 1983 State Bar fees bill will result in prejudice to defendant State Bar in that without knowledge of plaintiffs' objections and with legislative authorization, the State Bar has committed itself to support a number of programs, has expended sums for planning and administration of these programs, has entered into contracts with employees to further its programs, and has expended sums for program costs already incurred.

15. By virtue of the foregoing, plaintiffs are barred from seeking equitable relief by the doctrine of laches.

#### *THIRD FURTHER AND SEPARATE DEFENSE*

16. Defendants incorporate by reference as if set forth herein in full each and every allegation of Paragraphs 12 and 13 above.

17. Defendants are informed and believe that one of Plaintiffs' purposes in filing this action on October 25, 1982 was to attempt to characterize lawful State Bar programs, particularly the State Bar's public education project on an independent judiciary and the speaking



program of the President of the State Bar on this subject, as promoting "political and ideological causes" or "beliefs", and by so doing attempt to advance their own partisan "political and ideological" interests. Defendants are further informed and believe that plaintiffs also sought to create a chilling effect on and sought to impose an unlawful prior restraint on defendants' rights and duties to freely speak and associate and conduct the legitimate and lawfully authorized governmental activities of defendant State Bar. By virtue of the foregoing plaintiffs are barred from equitable relief by the doctrine of unclean hands.

18. Defendants are informed and believe that plaintiffs and the Pacific Legal Foundation have joined together in this suit to further their own "political and ideological causes" and "beliefs". Defendants are further informed and believe that Pacific Legal Foundation is a tax-exempt organization. Because of that status, all taxpayers, including defendant Board members, are compelled to support or subsidize the activities of Pacific Legal Foundation whether they agree or disagree with the "causes" or "beliefs" promoted by the activities of plaintiffs and Pacific Legal Foundation, including this suit against defendants.

19. Defendants have denied, and continue to deny, plaintiffs' claims that activities of the State Bar violate plaintiffs' constitutional rights to freedom of speech and association because defendants' activities promote "political and ideological causes" and "beliefs" and the activities are financed by the compulsory fees of plaintiffs who oppose the "causes" and "beliefs" promoted by these activities. Nonetheless, if defendants' activities are in any

way deemed unconstitutional because of mandatory financial support by those who would object, then activities of plaintiffs and Pacific Legal Foundation are similarly unconstitutional. By virtue of the foregoing, plaintiffs are estopped from claiming equitable relief herein and/or are barred from such relief by the doctrine of unclean hands.

#### *FOURTH FURTHER AND SEPARATE DEFENSE*

20. Defendants' actions are privileged and protected under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 2 of the California Constitution. Defendants are further privileged in that all actions complained of in plaintiff's Complaint were undertaken pursuant to legislative authorization and in good faith by defendants while they served as members of the Board of Governors of the State Bar, a governmental entity.

WHEREFORE, these answering defendants pray that:

1. The relief sought by the Petition and Complaint be denied;
2. Defendants be permitted to recover from plaintiffs their costs of this suit, including their reasonable attorneys' fees; and
3. The Court grant defendants such other and further relief as it deems just and proper.



DATED: March 29, 1983

HUFSTEDLER, MILLER, CARLSON  
& BEARDLSEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, Jr.  
MAGDALENE Y. O'ROURKE

By /s/ Magdalene Y. O'Rourke  
Magdalene Y. O'Rourke  
Attorneys for Defendants

---

(Filed in Sacramento County Superior Court)

*DECLARATION OF PETER J. JENSEN*

I, PETER J. JENSEN, declare:

1. That I am retained by the State Bar of California to perform services for the State Bar in the capacity of an independent contractor, acting as a Legislative Representative for that organization.

2. That in performing my duties as Legislative Representative for the State Bar of California I represent the State Bar of California as a public corporation and not the individual members of the State Bar of California.

3. That the foregoing statements are within my personal knowledge and, if sworn as a witness, I can testify competently thereto.

Executed on November 14, 1983 in Sacramento, Sacramento County, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Peter Jensen

---

(Filed in Sacramento County Superior Court)

*DECLARATION OF TERRANCE W. FLANIGAN*

I, Terrance W. Flanigan, declare:

1. That I am retained by The State Bar of California to perform services for the State Bar in the capacity of

independent contractor, acting as a legislative representative for that organization.

2. That in performing my duties as legislative representative for The State Bar of California I represent The State Bar of California as a public corporation and not the individual members of The State Bar of California.

3. That the foregoing statements are within my personal knowledge and, if sworn as a witness, I can testify competently thereto.

Executed on November 14, 1983 in San Francisco, San Francisco County, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Terrance W. Flanigan  
TERRANCE W. FLANIGAN

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
ANTHONY T. CASO  
Pacific Legal Foundation  
455 Capitol Mall, Suite 600  
Sacramento, California 95814  
Telephone: (916) 444-0154

Attorneys for Petitioners  
and Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	No. 307168
Petitioners and Plaintiffs,	)	
v.	)	
STATE BAR OF CALIFORNIA,	)	
a public corporation, et al.,	)	
Respondents and Defendants.	)	
<hr/>		

I N D E X T O  
ATTACHMENTS TO  
MOTION FOR PAR-  
TIAL SUMMARY  
JUDGMENT

Attachment A: Three documents entitled Report of Lobbyist Employer.

Attachment B: [Not included.]

Attachment C: One document entitled Nature and Interests of the Filer filed by the State Bar of California with the Secretary of State.

Attachment D: [Not included.]

Attachment E: State Bar of California Financial Statement, December 31, 1982, Statement of Revenues, Expenses and Changes in Fund Balances, compiled by Peat, Marwick, Mitchell & Co.

Attachment F: Page Nos. 13-15 of Enclosure A and Page No. 3 of Enclosure C to a document entitled Multi-Year Fee Ceiling Background, first submitted to this Court as Exhibit 2 to the State Bar's Points and Authorities in Opposition to Motion for Preliminary Injunction.

Attachment G: Appendix A to respondent and defendant's response to Interrogatory No. 9.

Attachment H: Page Nos. 9-10 of Enclosure A to document entitled Multi-Year Fee Ceiling Background, *supra*.

Attachment I: Appendix B to the respondent and defendant's response to Interrogatory No. 11.

Attachment J: Page No. 17 of Enclosure A to document entitled Multi-Year Fee Ceiling Background, *supra*.

Attachment K: Index by Subject to resolutions to be presented to the 1982 Conference of Delegates; document entitled Status of 1980 and 1981 Conference Resolutions.

Attachment L: State Bar News Releases dated April 6, 1983; February 26, 1983; October 8, 1983; October 1, 1982; and September 12, 1982.

#### ATTACHMENT A

RECEIVED AND FILED

in the office of the Secretary of State  
of the State of California

MAY 03 1982

MARCH FONG EU, Secretary of State

#### [ ] REPORT OF LOBBYIST EMPLOYER

(Government Code Section 86108(a))

#### [ ] REPORT OF PERSON SPENDING \$2,500 OR MORE TO INFLUENCE LEGISLATIVE OR ADMINISTRATIVE ACTION

(Government Code Section 86108(b))

Report Covers Period From 1/1/82 through 3/31/82  
Cumulative Period Beginning 1/1/82

(SEAL)

Print or Type All Information

For information required to be provided to you pursuant to the Information Practices Act of 1977, see "Information Manual for Lobbying Disclosure Provisions of the Political Reform Act"

Name State Bar of California

Business Address (Number and Street)  
(City) (State) (Zip Code) 555 Franklin St.,  
San Francisco, CA 94102

Telephone Number (415) 561-8200

#### PART I - LOBBYING ACTIVITIES

Specific Description of Legislative (Bill No.) or Administrative Action Actively Influenced or Attempted to Influence This Period AB's 629, 707, 843, 1029, 1209, 1439, 1850, 1883, 1950, 1983, 2452, 2913, 3274, 3483, 3530, 3552, 3569, 3576, 3607, 3618, 3625, 3651, 3657, 3684, 3689, 3712, 3728; ACA 78; SB's 1372, 1924, 1944, 1980, 1988, 1998, AB's 490, 606, 622, 798, 1040, 1191, 1383, 2174, 2284, 2312, 2331, 2340, 2341, 2357, 2365, 2371, 2382, 2426, 2567, 2750, 2751, 3170, ACA 49; SB's 203, 267, 500, 884, 1025, 1360, 1436, SCA's 10, 27.

State Agency Involved Members of the Legislature



Attach additional information on appropriately labeled continuation sheets

PART II - INDIVIDUAL LOBBYIST EMPLOYED - (to be completed only by lobbyist employers)

OFFICIAL USE ONLY	FULL NAME OF LOBBYIST	(A) SALARIES, FEES, RETAINERS	(B) REIMBURSE- MENTS OF EXPENSES
	Terrance Flanigan	\$11,000.01	\$1,282.70
	Peter Jensen	12,575.01	1,669.55
	Leesa Speer	8,274.00	1,659.68
		\$31,849.02	\$4,611.93

(C) ADVANCES OR OTHER PAYMENTS (ATTACH EXPLANATION)	(D) TOTAL THIS PERIOD	(E) CUMULATIVE TOTAL TO DATE
\$ -0-	\$12,282.71	\$12,282.71
-0-	14,244.56	14,244.56
-0-	9,933.68	9,933.68
-0-	\$36,460.95	\$36,460.95

VERIFICATION

Is this the first report for this calendar year? [X] Yes (Attach Form 670) [ ] No

Is this report being filed by a business entity which has been retained to influence legislative or administrative action? [ ] Yes (Attach Form 600) [X] No

I declare under penalty of perjury that this report is to the best of my knowledge true and complete and that I have used all reasonable diligence in its preparation.

Executed on (Date) April 29, 1982 At (City and State) San Francisco, California By (Signature of filer or authorized agent) Mary G. Wailes

Name of Filer The State Bar of California

PART III - PAYMENTS

SECTION A: ACTIVITY EXPENSES INCURRED BY THE FILER

Payments which benefit (directly or indirectly) any elective state official, legislative official, agency official, state candidate or member of their immediate family.

1. Payments aggregating \$25 or more this period: N.A.
2. Total payments aggregating less than \$25 this period

SECTION B: OTHER PAYMENTS TO INFLUENCE LEGISLATIVE OR ADMINISTRATIVE ACTION

(Other than to a lobbyist, but including payments to retained entities)

1. Payments aggregating \$25 or more this period for goods and services provided outside the filer's organization.

Date Name and Address of Payee  
 02-16-82 Winner, Wagner & Assoc. Inc.  
 03-26-82 Winner, Wagner & Assoc. Inc.  
 03-26-82 Winner, Wagner & Assoc. Inc.

Description of Consideration	Amount
01/82 Prof. fees and expenses reimb.	\$ 4,344.15
02/82 Prof. fees and expenses reimb.	4,270.70
03/82 Prof. fees and expenses reimb.	4,048.35

TOTAL 1. \$ 12,663.20

2. Payments aggregating less than \$25 this period for goods and services provided *outside* the filer's organization

TOTAL 2. \$ 219.70

3. Payments for costs incurred *within* the filer's own organization:

Gross compensation of employees paid less than \$1,000 this period \$ -0-

Gross compensation of employees paid \$1,000 or more this period \$ 9,903.00

(Attach list showing names, titles and amount attributable to each person)

Other overhead incurred by filer (need not be itemized) \$13,788.36

TOTAL 3. \$23,691.36

TOTAL SECTION B \$36,574.26

GRAND TOTAL - PART II (Column D) AND PART III (Sections A & B) \$ 73,035.21

#### OPTIONAL

Total-expenses this period to influence legislative action \$

Total expenses this period to influence administrative action \$

#### PART IV - CAMPAIGN CONTRIBUTIONS: STATE AND LOCAL\* N.A.

*\*Disclosure in this report does not relieve a filer of any obligation to file the campaign reports required by Government Code Section 84200*

*Gross compensation of employees paid \$1,000 or more this period:*

1. Eleanor Danielson - Senior Administrative Assistant	\$ 6,321.00
2. Anita Montiero - Senior Secretary	<u>3,582.00</u>
	\$ 9,903.00

RECEIVED AND FILED

in the office of the Secretary of State  
of the State of California

AUG 02 1982

MARCH FONG EU, Secretary of State

[X] REPORT OF LOBBYIST EMPLOYER  
(Government Code Section 86108(a))

[ ] REPORT OF PERSON SPENDING \$2,500 OR MORE  
TO INFLUENCE LEGISLATIVE OR ADMINISTRATIVE  
ACTION  
(Government Code Section 86108(b))

(If the only payments made were payments which directly or indirectly benefit any elective state official, legislative official, or agency official or members of the immediate family of such official this report does not need to be filed.)

(SEAL)

Report Covers Period From 4/1/82 Through 6/30/82  
Cumulative Period Beginning 1/1/82

— Print or Type All Information

*For information required to be provided to you pursuant to the Information Practices Act of 1977, see "Information Manual for Lobbying Disclosure Provisions of the Political Reform Act"*

Name State Bar of California

Business Address (Number and Street) 555 Franklin  
Street (City) San Francisco (State) CA (Zip  
Code) 94102 Telephone Number (415) 561-8200

PART I - LOBBYING ACTIVITIES

Specific Description of Legislative (Bill No.) or Administrative Action Actively Influenced or Attempted to Influence This Period

AB 104, 129, 188, 256, 298, 351, 365, 424, 490, 590, 603, 622, 238, 690, 707, 718, 726, 728, 798, 829, 843, 877, 912, 961, 997, 1007, 1040, 1156, 1166, 1209, 1210, 1279, 1339, 1383, 1387, 1495, 1607, 1706, 1787, 1805, 1850, 1928, 1985, 2038, 2130, 2174, 2202, 2284, 2312, 2330, 2332, 2339, 2340, 2349, 2357, 2365, 2370, 2377, 2382, 2383, 2384, 2386, 2392, 2393, 2407, 2416, 2424, 2426, 2436, 2437, 2443, 2446, 2449, 2452,

2477, 2484, 2493, 2501, 2516, 2525, 2540, 2544, 2545, 2546, 2557, 2567, 2570, 2586, 2588, 2591, 2593, 2595, 2597, 2604, 2622, 2684, 2687, 2702, 2704, 2705, 2710, 2750

State Agency Involved Members of the  
Legislature Governor

PART II - INDIVIDUAL LOBBYIST EMPLOYED - (To be completed only by lobbyist employers)

OFFICIAL USE ONLY	FULL NAME OF LOBBYIST	(A) SALARIES, FEES, RETAINERS	(B) REIMBURSE- MENTS OF EXPENSES
	Terrance Flanigan	11,000.01	1,180.94
	Peter Jensen	12,575.01	1,729.14
	Leesa Speer	8,274.00	1,503.43
		31,849.02	4,413.51
(C) ADVANCES OR OTHER PAYMENTS (ATTACH EXPLANATION)	(D) TOTAL THIS PERIOD	(E) CUMULATIVE TOTAL TO DATE	
-0-	12,180.95	24,463.66	
-0-	14,304.15	28,548.71	
-0-	9,777.43	19,711.11	
-0-	36,262.53	72,723.48	

Attach Additional Information on Appropriately Labeled  
Continuation Sheets



## VERIFICATION

Is this the first report for this calendar year? ☐ Yes  
(attach Form 670) ☐ No

Is this report being filed by a business entity which has  
been retained to influence legislative or administrative  
action? ☐ Yes (attach Form 680) ☐ No

I declare under penalty of perjury that this report is to the  
best of my knowledge true and complete and that I have  
used all reasonable diligence in its preparation.

Executed on (date) illegible At (city and  
state) illegible By (signature of filer or authorized  
agent) illegible

## PART III - PAYMENTS

SECTION A: ACTIVITY EXPENSES INCURRED BY THE  
FILER

Payments which benefit (directly or indirectly) any elec-  
tive state official, legislative official, agency official, state  
candidate or member of their immediate family.

Payments aggregating \$25 or more this period: N.A.

SECTION B: OTHER PAYMENTS TO INFLUENCE LEG-  
ISLATIVE OR ADMINISTRATIVE ACTION

(Other than to a lobbyist, but including payments to retained  
entities)

Payments aggregating \$25 or more this period for goods  
and services provided *outside* the filer's organization.

## Date Name and Address of Payee

02-04-82 Winner Wagner and Assoc.

03-05-82 "

03-06-82 "

## Description of Consideration Amount

04/82 Prof. fees and reimb. of exp. \$ 4,282.71

05/82 Prof. fees and reimb. of exp. 4,121.03

06/82 Prof. fees and reimb. of exp. 4,012.46

Attach additional information on appropriately labeled  
continuation sheets

TOTAL 1. \$12,416.20

Payments aggregating less than \$25 this period for goods  
and services provided *outside* the filer's organization

TOTAL 2. \$ 186.77

Payments for costs incurred *within* the filer's own  
organization:

Gross compensation of employees  
paid less than \$1,000 this period \$ -0-

Gross compensation of employees  
paid \$1,000 or more this period \$10,188.06

(Attach list showing names, titles and  
amount attributable to each person)

Other overhead incurred by filer  
(need not be itemized) \$14,962.59

TOTAL 3. \$ 25,150.65

TOTAL SECTION B \$ 37,753.62

## GRAND TOTAL - PART II (Column D)

AND PART III (Sections A &amp; B) \$ 74,016.15

PART IV - CAMPAIGN CONTRIBUTIONS: STATE AND  
LOCAL\* N.A.

*\*Disclosure in this report does not relieve a filer of any obligation to file the campaign reports required by Government Code Section 84200.*

## PART I - LOBBYIST ACTIVITIES (Cont.)

AB 2751, AB 2755, AB 2767, AB 2769, AB 2788, AB 2800, AB 2893, AB 2911, AB 2913, 2964, 4965, 2984, 2985, 2988, 3021, 3026, 3044, 3049, 3147, 3156, 3170, 3235, 32(illegible), 3264, 3274, 3291, 3302, 3309, 3353, 3387, 3427, 3441, 3454, 3483, 3486, 3530, 35(illegible), 3532, 3552, 3557, 3560, 3567, 3568, 3569, 3576, 3596, 3607, 3611, 3612, 3614, 36(illegible), 3625, 3650, 3651, 3657, 3676, 3684, 3689, 3693, 3700, 3712, 3721, 3725, 3728, 37(illegible), 3739, 3756, 3771, 3780, 3784, 3802; ACA 2, 8, 10, 11, 15, 16, 18, 31, 36, 40, 45, 49, 59, 61, 64, 66, 67, 69, 76, 78; ACR 49, AJR 62, 63; SB 14, 63, 221, 247, 267, 294, 299, 304, 305, 332, 341, 385, 396, 500, 516, 580, 587, 720, 745, 820, 884, 902, 1025, 1055, 1082, 1108, 1150, 1208, 1214, 1249, 1250, 1276, 1283, 1286, 129(illegible), 1294, 1300, 1308, 1320, 1327, 1337, 1339, 1349, 1355, 1356, 1360, 1369, 1372, 13(illegible), 1395, 1413, 1436, 1447, 1496, 1512, 1574, 1600, 1609, 1634, 1670, 1672, 1678, 17(illegible), 1730, 1762, 1793, 1837, 1882, 1884, 1891, 1924, 1930, 1936, 1944, 1957, 1973, 19(illegible), 1981, 1988, 1998, 2018, 2022, 2023, 2028, 2032, 2037, 2063; SCA 1, 3, 4, 5, 6, 7, 10, 19, 25, 26, 27, 35, 37, 41; SJR 29; SR 38

*Gross compensation of employees paid \$1,000 or more this period*

1. Eleanor Danielson -	
Sr. Administrative Assistant	\$ 2,593.11
2. Anita Montiero -	
Sr. Secretary	3,582.00
3. Irma Roberts -	
Sr. Administrative Assistant	4,012.95
	<u>\$10,188.06</u>

## RECEIVED AND FILED

In the office of the Secretary of State  
of the State of California

NOV 2 1982

MARCH FONG EU, Secretary of State

## [X] REPORT OF LOBBYIST EMPLOYER

(Government Code Section 86108(a))

[ ] REPORT OF PERSON SPENDING \$2,500 OR MORE  
TO INFLUENCE LEGISLATIVE OR ADMINISTRATIVE  
ACTION

(Government Code Section 86108(b))

(If the only payments made were payments which directly or indirectly benefit any elective state official, legislative official, or agency official or members of the immediate family of such official this report does not need to be filed.)

Report covers period from 7/1/82 through 9/30/82

Cumulative period beginning 1/1/82

(SEAL)

## PRINT OR TYPE ALL INFORMATION

*For information required to be provided to you pursuant to the information Practices Act of 1977, see "Information Manual for Lobbying Disclosure Provisions of the Political Reform Act"*

Name State Bar of California Business Address  
(Number and Street) 555 Franklin Street (City) San  
Francisco (State) CA (Zip Code) 94102 Telephone  
Number (415) 561-8200

## PART I - LOBBYING ACTIVITIES

Specific Description of Legislative (Bill No.) or Adminis-  
trative Action Actively Influenced or Attempted to Influ-  
ence This Period

AB 104, 129, 188, 256, 298, 351, 365, 424, 490, 590, 603, 622,  
238, 690, 707, 718, 726, 728, 798, 829, 843, 877, 912, 961,  
997, 1007, 1040, 1156, 1166, 1209, 1210, 1279, 1339, 1383,  
1387, 1495, 1607, 1706, 1787, 1805, 1850, 1928, 1985, 2038,  
2130, 2174, 2202, 2284, 2312, 2330, 2332, 2339, 2392, 2393,  
2407, 2416, 2424, 2426, 2436, 2437, 2443, 2446, 2449, 2452,  
2477, 2484, 2493, 2501, 2516, 2525, 2540, 2544, 2545, 2546,  
2557, 2567, 2570

State Agency Involved  
Members of the Legislature Governor

Attach Additional Information on Appropriately  
Labeled Continuation Sheets

## PART II - INDIVIDUAL LOBBYIST EMPLOYED - (to be completed only by lobbyist employers)

OFFICIAL USE ONLY	FULL NAME OF LOBBYIST	(A) SALARIES, FEES, RETAINERS	(B) REIMBURSE- MENTS OF EXPENSES
	Terrance Flanigan	11,000.01	1,232.91
	Peter Jensen	12,575.01	2,687.94
	Leesa Speer	9,249.00	952.22
		32,824.02	4,873.07

(C) ADVANCES OR OTHER PAYMENTS (ATTACH EXPLANATION)	(D) TOTAL THIS PERIOD	(E) CUMULATIVE TOTAL TO DATE
-0-	12,232.92	36,696.58
-0-	15,262.95	43,811.66
-0-	10,201.22	29,912.33
-0-	37,697.09	110,420.57

Attach Additional Information on Appropriately Labeled  
Continuation Sheets

## VERIFICATION

Is this the first report for this calendar year? ☐ Yes  
(attach Form 670) ☒ No

Is this report being filed by a business entity which has  
been retained to influence legislative or administrative  
action? ☐ Yes (attach Form 680) ☐ No



I declare under penalty of perjury that this report is to the best of my knowledge true and complete and that I have used all reasonable diligence in its preparation.

Executed on (date) October 27, 1982 At (city and state) San Francisco, California By (signature of filer or authorized agent) Mary G. Wailes

### PART III - PAYMENTS

#### SECTION A: ACTIVITY EXPENSES INCURRED BY THE FILER

Payments which benefit (directly or indirectly) any elective state official, legislative official, agency official, state candidate or member of their immediate family.

##### 1. Payments aggregating \$25 or more this period:

N.A.

#### SECTION B: OTHER PAYMENTS TO INFLUENCE LEGISLATIVE OR ADMINISTRATIVE ACTION

(Other than to a lobbyist, but including payments to retained entities)

##### 1. Payments aggregating \$25 or more this period for goods and services provided *outside* the filer's organization.

Date	Name and Address of Payee
07-82	Winner, Wagner & Assoc.
08-82	"
09-82	"

Description of Consideration	Amount
06/82 Prof. fees and reimb. of exp.	\$ 3,716.70
07/82 "	3,943.60
08/82 "	4,078.30

Attach additional information on appropriately labeled continuation sheets

TOTAL 1. \$ 11,738.60

##### 2. Payments aggregating less than \$25 this period for goods and services provided *outside* the filer's organization

TOTAL 2. \$ 230.00

##### 3. Payments for costs incurred *within* the filer's own organization:

Gross compensation of employees  
paid less than \$1,000 this period \$ -0-

Gross compensation of employees  
paid \$1,000 or more this period 8,532.30

(Attach list showing names, titles and  
amount attributable to each person)

Other overhead incurred by filer  
(need not be itemized) \$15,771.69

TOTAL 3. \$ 24,303.99

TOTAL SECTION B \$ 36,272.59

GRAND TOTAL - PART II (Column D) AND PART III  
(Sections A & B) \$ 73,969.68

## Optional

Total expenses this period to influence  
legislative action \$

Total expenses this period to influence  
administrative action \$

PART IV - CAMPAIGN CONTRIBUTIONS: STATE AND  
LOCAL\* N.A.

*\*Disclosure in this report does not relieve a filer of any obligation to file the campaign reports required by Government Code Section 84200*

PART I - LOBBYING ACTIVITIES (Cont.)

2586, 2588, 2591, 2593, 2595, 2597, 2604, 2622, 2684, 2687,  
2702, 2704, 2710, 2750, 2751, 2755, 2767, 2769, 2788, 2800,  
2893, 2911, 2913, 2964, 2965, 2984, 2985, 2988, 3021, 3026,  
3044, 3049, 3147, 3156, 3170, 3235, 3258, 3264, 4274, 3291,  
3302, 3309, 3353, 3387, 3427, 3441, 3454, 3483, 3486, 3530,  
3531, 3532, 3552, 3557, 3560, 3567, 3568, 3569, 3576, 3596,  
3607, 3611, 3612, 3614, 3618, 3625, 3650, 3651, 3657, 3676,  
3684, 3689, 3693, 3700, 3712, 3721, 3725, 3728, 3736, 3739,  
3756, 3771, 3780, 3784, 3802, ACA 2, 8, 10, 11, 15, 16, 18,  
31, 36, 40, 45, 49, 59, 61, 64, 66, 67, 69, 76, 78, ACR 48, AJR  
62, 63, SB 14, 63, 221, 247, 267, 294, 299, 304, 305, 332, 341,  
385, 396, 500, 516, 580, 587, 720, 745, 820, 883, 902, 1025,  
1055, 1082, 1108, 1150, 1208, 1214, 1249, 1250, 1276, 1283,  
1286, 1290, 1294, 1300, 1308, 1320, 1327, 1337, 1339, 1349,  
1355, 1356, 1360, 1369, 1372, 1385, 1395, 1413, 1436, 1447,  
1496, 1512, 1574, 1600, 1609, 1634, 1670, 1672, 1678, 1712,  
1730, 1762, 1793, 1837, 1882, 1884, 1891, 1924, 1930, 1936,  
1944, 1957, 1973, 1980, 1981, 1988, 1998, 2018, 2022, 2023,  
2028, 2032, 2037, 2063, SCA 1, 3, 4, 5, 6, 7, 10, 19, 25, 26,  
27, 35, 37, 41, SJR 29, SR 38

GROSS COMPENSATION OF  
EMPLOYEES PAID \$1,000.00 OR MORE  
THIS PERIOD

1. Irma Roberts -	
Sr. Administrative Assistant	\$ 4,890.60
2. Anita Montiero -	
Sr. Secretary	3,641.70
	<u>\$ 8,532.30</u>

ATTACHMENT C

RECEIVED AND FILED

In the office of the Secretary of State  
of the State of California

MAY 03 1982

MARCH FONG EU, Secretary of State

NATURE AND INTERESTS OF THE FILER

(Government Code Section 86109)

(SEAL)

*You need to complete this schedule only with  
the first report filed each year.*

PRINT OR TYPE ALL INFORMATION

*For information required to be provided to you pursuant to the  
Information Practices Act of 1977, see Information Manual for  
Lobbying Disclosure Provisions of the Political Reform Act"*

Name The State Bar of California Business Address  
(Number and Street) 555 Franklin Street, (City) San

Francisco, (State) CA (Zip Code) 94102 Telephone  
Number (415) 561-8200

#### PART I - INDIVIDUAL

• • •

#### PART II - BUSINESS ENTITY

• • •

#### PART III - INDUSTRY, TRADE OR PROFESSIONAL ASSOCIATION

• • •

#### VERIFICATION

I declare under penalty of perjury that this report is to the best of my knowledge true and complete and that I have used all reasonable diligence in its preparation.

Executed on (date) illegible At (city and state) San Francisco, California By (signature of filer or authorized agent) Mary G. Wailes

• • •

#### PART IV - MISCELLANEOUS

##### A. Statement of Nature and Purposes

The State Bar of California is a public corporation in the judicial branch of State Government, Article VI, Section 9, California Constitution. See Exhibit A attached hereto.

B. Description of any industry, trade, profession or other group with a common economic interest which is

principally represented or from which membership or financial support is principally derived.

"Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." Article VI, Section 9, California Constitution. See Exhibit A attached hereto.

#### EXHIBIT A

##### STATE BAR ORGANIZATION, DUTIES AND POWERS

##### A. ORGANIZATION

The State Bar of California is a constitutional agency provided for in the judicial article of the California Constitution (art. VI, § 9). The State Bar is a public corporation. (Cal. Const. art. VI, § 9; Bus. & Prof. Code, § 6001.)

The State Bar's property is held for essential public and governmental purposes in the judicial branch of the government, exempt from all taxes of the state or any city, city and county, district, public corporation or other political subdivision, public body or public agency. (Bus. & Prof. Code, 6068.)

The State Bar is governed by a Board of Governors of twenty-two members who are public officers. Sixteen of the twenty-two members are active members of the State Bar. Fifteen of these sixteen members are nominated and elected by active members of the State Bar from nine



geographical districts established by the State Legislature. The sixteenth attorney member of the Board is elected by the board of directors of the California Young Lawyers Association ("CYLA") from the membership of that association. (Bus. & Prof. Code, §§ 6010, 6011, 6012, 6013, 6013.4, 6015, 6019; *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 566.)

Six members of the Board are non-attorneys appointed by the Governor, subject to the confirmation of the State Senate. (Bus. & Prof. Code, § 6013.5.) Board members serve for three years (Bus. & Prof. Code, § 6013.5, 6014), except the Board member elected by the board of directors of the CYLA, who serves for one year and is eligible for re-election (Bus. & Prof. Code, § 6013.4). The other fifteen attorney members of the Board may not succeed themselves. (Bus. & Prof. Code, § 6014). Attorney members of the Board receive no compensation except their expenses. (Bus. & Prof. Code, § 6028(b)). Public members of the Board receive \$50 per day for each day actually spent in the discharge of official duties, but in no event shall such payment exceed \$500 per month. (Bus. & Prof. Code, § 6028(c)). The Board annually elects the officers of the State Bar. (Bus. & Prof. Code, §§ 6021-6024).

Members of the State Bar are all persons admitted and licensed to practice law in this state, except justices and judges of courts of record during their continuance in office. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6002).

The activities of the State Bar, except those relating to the functions and duties of the Committee of Bar Examiners, and the Pilot Program on Legal Specialization, are financed with funds derived from annual membership

dues paid by its members. (Bus. & Prof. Code, § 6140). The functions and activities of the Committee of Bar Examiners are financed by fees paid by applicants for admission to practice. (Bus. & Prof. Code, § 6063). All fees are paid into the State Bar treasury and become part of its funds. (Bus. & Prof. Code, § 6144, 6063). While the Legislature has empowered the Board to fix membership fees, it has set maximum fees which the Board may not exceed. (Bus. & Prof. Code, §§ 6140, 6140.3.)

A certified statement showing the total receipts and expenditures of the State Bar for the preceding twelve months is filed with the Chief Justice of the Supreme Court annually. (Bus. & Prof. Code, § 6145.)

## B. DUTIES AND POWERS

The Board of Governors exercises the executive functions of the State Bar and enforces the provisions of the State Bar Act. (Bus. & Prof. Code, §§ 6001, 6008.4, 6010, 6030.)

The duties and powers of the State Bar are defined in the Constitution and in the statutes of the State of California, in the California Rules of Court and in decisions of the California Supreme Court.

The State Bar, in the exercise of its constitutional duties, appoints four members of the Judicial Council and two members of the Commission on Judicial Performance. (Cal. Const., art VI, §§ 6, 8.)

The State Bar's statutory, rule and decisional duties fall into several categories, among which the principal ones are:

- (1) Assisting the Supreme Court of California in the matter of admissions to practice law, by investigating and examining applicants and certifying for admission those found to be qualified. (Bus. & Prof. Code, §§ 6060-6066; rule 952(c), Cal. Rules of Court; *Emslie v. State Bar* (1974) 11 Cal. 3d 210, 224; *Bernstein v. Committee of Bar Examiners* (1968) 69 Cal.2d 90; *Staley v. State Bar* (1941) 17 Cal. 2d 119; *In re Admission to Practice Law* (1934) 1 Cal.2d 61.)
- (2) Assisting the California Supreme Court in matters relating to the conduct of members of the State Bar by investigations, hearings and trials, and by administering reprovations and making recommendations to the Supreme Court for suspension or disbarment. (Bus. & Prof. Code, §§ 6075-6087; *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224; *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548; *In re Walker* (1948) 32 Cal. 2d 488.)
- (3) Assisting the California Supreme Court by procuring and transmitting to it records of convictions of State Bar members of crimes involving or appearing to probably involve moral turpitude, conducting hearings in such matters and making recommendations to the Supreme Court for suspension or disbarment. (Bus. & Prof. Code, §§ 6101, 6102; rule 951, Cal. Rules of Court; *In re Smith* (1967) 67 Cal.2d 460; *In re Hallinan* (1954) 43 Cal.2d 243.)
- (4) Assisting the California Supreme Court in the matter of petitions for reinstatement to the practice of law. (Bus. & Prof. Code, § 6082; rule 952(c) and (d), Cal. Rules of Court; *Feinstein v. State Bar* (1952) 39 Cal.2d 541.)

- (5) Cooperating with and giving assistance to the Commission on Judicial Performance. (Gov. Code, § 68725.)
- (6) Assisting the Law Revision Commission. (Gov. Code, § 10307.)
- (7) Enforcing the law relating to the unlawful practice of law and unlawful solicitation of professional employment. (Bus. & Prof. Code, §§ 6030, 6125-6131, 6150-6154.)
- (8) Aiding in all matters pertaining to the advancement of the science of jurisprudence and to the improvement of the administration of justice including, but not by way of limitation, all matters that advance the professional interests of members of the State Bar and such matters as concern the relations of the bar with the public. (Bus. & Prof. Code, § 6031.)
- (9) Enrolling as an inactive member any member who has been adjudged incompetent, mentally ill or insane and who has not been restored to capacity. (Bus. & Prof. Code, § 6007.)
- (10) Enforcing provisions of article 10, chapter 4, division 3 of the Business and Professions Code (§§ 6160-6172) and part 4, division 3, title 1 of the Corporations Code, authorizing the establishment of law corporations.
- (11) Evaluating the judicial qualifications of all potential appointees and nominees for judicial office who are nominated by the Governor of California pursuant to subdivision (d) of Section 16 of Article VI of the California Constitution. Stats. 1979, Ch. 534 § 2 (adding Cal. Gov. Code § 12011.5).



- (12) Establish, maintain and administer a system and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the Bar of other jurisdictions (Bus. & Prof. Code §§ 6200-6206).
- (13) Establish and maintain a client security fund to relieve or mitigate pecuniary losses caused by dishonest conduct of active members of the State Bar (Bus. & Prof. Code § 6140.5).
- (14) Make application to the Superior Court in the county in which the attorney practices for assumption by the court of jurisdiction over the law practice of an attorney who dies, resigns, is disbarred or suspended, leaving an unfinished client matter for which no other attorney has assumed responsibility (Bus. & Prof. Code §§ 6180-6180.14).
- (15) Formulate and adopt minimum standards for lawyer reference services in California. (Rule 1-10213, Rules of Professional Conduct).
- (16) Implement and administer the Pilot Program on Legal Specialization as approved by the Supreme Court, effective February 10, 1971.

For the implementation of its duties, the Board of Governors exercises statutory powers to, among other things:

- (1) Do, in respect of its property, all acts necessary or expedient for the administration of its affairs and the attainment of its purposes. (Bus. & Prof. Code, § 6001(g).)

- (2) Formulate and declare rules and regulations necessary or expedient for carrying out the State Bar Act. (Bus. & Prof. Code, § 6025.)
- (3) Formulate with the approval of the Supreme Court rules of professional conduct for all members of the bar and enforce the same. (Bus. & Prof. Code, § 6076.)
- (4) Appoint such committees, officers and employees as it deems necessary or proper. (Bus. & Prof. Code, §§ 6029, 6040-6043, 6045-6046, 6086.5)
- (5) Make appropriations and disbursements from funds of the State Bar to pay all necessary expenses (including fixing and paying salaries) for effectuating the purposes of the State Bar Act. (Bus. & Prof. Code, §§ 6028(a), 6029.)
- (6) Establish and promulgate rules and procedures regarding the investigation of qualification of potential appointees and nominees for judicial office. (Stats. 1979, Ch. 534 § 2(e).)

---

#### ATTACHMENT E

#### THE STATE BAR OF CALIFORNIA

#### Financial Statements

December 31, 1982

(With Accountants' Report Thereon)

Peat, Marwick, Mitchell & Co.



THE STATE BAR OF CALIFORNIA  
Statement of Revenues, Expenses and  
Changes in Fund Balances  
Year ended December 31, 1982

	Unrestricted Funds (note 1)	Restricted Funds (note 1)					
	<u>General</u>	<u>Admissions</u>	<u>Building</u>	<u>Client Security (note 10)</u>	<u>Grants</u>	<u>Legal Services Trust</u>	<u>Total All Funds</u>
Revenues:							
Membership fees	\$ 11,732,045	-	759,588	-	-	-	12,491,633
Examination application fees	-	3,756,757	-	-	-	-	3,756,757
Investment income	660,725	166,255	48,073	209,307	-	-	1,084,360
Law corporation registration fees	514,811	-	-	-	-	-	514,811
Magazine advertisements, subscriptions	418,976	-	-	-	-	-	418,976
Law practices (Sections) fees	380,996	-	-	-	-	-	380,996
Legal specialization fees	252,127	-	-	-	-	-	252,127
Convention income	160,749	-	-	-	-	-	160,749
Grants	-	-	-	-	170,080	-	170,080
Other revenues	194,459	250,544	-	-	10,073	-	455,076
Total revenues	14,314,888	4,173,556	807,661	209,307	180,153	-	19,685,565

## Expenses:

Examination costs and administration	-	3,844,374	-	-	-	-	3,844,374
Professional standards and competency	4,050,048	-	-	-	-	-	4,050,048
Discipline, administration and counsel	1,868,213	-	-	-	-	-	1,868,213
Legal services, legislation and law reform	2,005,134	-	-	-	-	-	2,005,134
Bar services, including publication of magazine	2,021,419	-	-	-	-	-	2,021,419
Law practices (Sections)	468,759	-	-	-	-	-	468,759
Claims paid, net of reimbursements	-	-	-	363,161	-	-	363,161
Interest expense	14,243	2,170	203,190	-	-	-	219,603
Legal specialization	273,875	-	-	-	-	-	273,875
General administration	<u>3,217,914</u>	<u>-</u>	<u>211,451</u>	<u>-</u>	<u>190,699</u>	<u>87,498</u>	<u>3,707,562</u>
Total expenses	<u>13,919,605</u>	<u>3,846,544</u>	<u>414,641</u>	<u>363,161</u>	<u>190,699</u>	<u>87,498</u>	<u>18,822,148</u>
Excess (deficiency) of revenues over expenses	395,283	327,012	393,020	(153,854)	(10,546)	(87,498)	863,417
Fund balances, beginning of year	1,372,787	237,903	2,891,242	1,786,483	13,183	-	6,301,598
Prior period adjustment (note 8)	<u>(91,403)</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>(91,403)</u>
Fund balance, end of year	<u>\$ 1,676,667</u>	<u>564,915</u>	<u>3,284,262</u>	<u>1,632,629</u>	<u>2,637</u>	<u>(87,498)</u>	<u>7,073,612</u>

See accompanying notes to financial statements.

## ATTACHMENT F

Health, life, accident and disability insurance: The bar Board of Governors approved four plans, underwritten by different insurance carriers, to provide health care coverage for bar members, their employees and their dependents; life insurance for bar members and their dependents; accidental death and dismemberment coverage for bar members and their dependents, and disability income insurance for bar members.

*\*California Young Lawyers Association*

This organization, to which more than half of California's 75,000 lawyers belong, serves the special needs of bar members 36 years old and under or in practice less than five years. Among CYLA's benefits are:

-Representation on the bar Board of Governors. To better represent the viewpoint of the beginning lawyer, a seat was created on the Board of Governors for a member of the CYLA, selected by the CYLA Board of Directors from among the organization's members. The first CYLA board member was seated in February, 1979. CYLA representatives on the board serve one-year terms.

-Booklets and a videotape program geared toward young lawyers and addressing such subjects as law practice economics and how to set up a law office.

-Discounts on certain Continuing Education of the Bar programs.

-Lawyer employment surveys to keep new lawyers and law school students informed of unemployment and



underemployment rates among lawyers and about other job-market trends.

#### *\*Sections*

State bar sections exist to give bar members in a particular field of practice or who share common professional objectives or interests a vehicle for conducting legislative research and analysis; sponsoring specialized seminars, conferences and workshops; and discussing mutual problems and possible solutions. In addition, each section publishes a periodic newsletter for its members. The highly active sections are self-funding through dues contributions by the 29,310 lawyers belonging to the sections, except for legal, administrative and clerical support provided by the state bar.

The bar's 11 sections and their respective memberships are:

- \*Antitrust Law (52) (approved April, 1981)
- \*Business Law (5,868)
- \*Criminal Law (958)
- \*Law Office Management (9,247)
- \*Estate Planning, Trust and Probate Law (3,921)
- \*Family Law (2,587)
- \*Legal Services (541)
- \*Patent, Trademark and Copyright Law (654)
- \*Public Law (730)

\*Real Property Law (2,217)

\*Taxation (2,535)

All but two – the Law Office Management and Legal Services sections – address a substantive area of the law. The Law Office Management Section presents programs to enhance lawyer competence by teaching lawyers proper business management techniques and studying possible ways of increasing the economical delivery of legal services to the public to improve their access to legal help.

Delivery issues also are the focus of the Legal Services Section, which was formed to enlist lawyer support in the innovation, development and improvement of systems to provide access to legal services, particularly to the middle-and low-income populations of the state. Areas of study by the section include Lawyer Referral Services, legal assistance for the poor, group and prepaid legal services, criminal defense services, public interest law practice, consumer laws, legal services for Senior Citizens, legal services for the disabled and prison inmate legal aid. The section also researches, drafts and recommends legislation for the improvement of legal services delivery in California.

#### *\*Committees*

Twenty-two state bar standing committees perform a variety of functions, ranging from legislative analysis to assisting lawyers suffering from alcoholism:

- \*Administration of Justice
- \*Adoptions

- \*Alcohol Abuse
- \*Appellate Courts
- \*Committee to Confer with the California Medical Association
- \*Condemnation
- \*Continuing Education of the Bar
- \*Courts
- \*Ethnic Minority Relations
- \*Environment
- \*Fair Trial-Free Press
- \*Federal Courts
- \*Group Insurance Program
- \*History of Law
- \*Human Rights
- \*Jury Instructions
- \*Juvenile Justice
- \*Maintenance of Professional Competence
- \*Professional Responsibility and Conduct
- \*Public Affairs
- \*Rules and Procedures of Court
- \*Workers' Compensation

*Programmatic Analysis of  
1982 General Fund Operating Budget*

IMPROVING THE ADMINISTRATION OF JUSTICE

<u>Program Description</u>	<u>Program Cost</u>
Commission on Judicial Nominees Evaluation	\$ 94,235
Volunteers in Parole	37,027
Legislative Representatives' Office	420,080
Conference of Delegates	313,811
Sections and Committees Support	<u>1,006,931</u>
TOTAL	<u>\$1,872,084</u>

ATTACHMENT G

VOLUNTEERS SOUGHT TO SERVE ON  
STATE BAR COMMITTEES

Several hundred attorneys volunteer their expertise each year to a wide selection of state bar committees covering nearly every legal field and interest the Board of Governors is proud and appreciative of the volunteers' contributions to the state bar's legislative program, its position on matters affecting the legal profession and its services to the public.

The Board of Governors invites all qualified and interested persons to apply for appointment to the committees, commissions and executive committees describe

below. The board intends to make appointments that will achieve diversity, and broad representation on each committee, and thus encourages the participation of women, minorities and recent bar admittees, as well as more experienced attorneys.

Approximately one-third of the committee and commission members are replaced each year. There are five vacancies for each section executive committee. The appointment procedures for the 1983-84 committee year begin in May and end in late August. Except for the Committee of Bar Examiners, which is a four-year term, members of committees are appointed for one-year terms, running from October 1 to September 30, and may be appointed for two additional terms. Members of section executive committees and all commissions except Corrections are appointed for three-year terms.

Members are reimbursed for expenses incurred in attending meetings, which usually are held alternately in San Francisco and Los Angeles. The number of yearly meetings varies from committee to committee, but they normally last four to six hours and require several hours of preparation.

At its discretion, the Board of Governors may appoint persons nominated by the section to the section executive committee. Nominations for such appointments may be made by an executive committee acting as a nominating committee or by a petition signed by at least 15 members of the section. Active members of a section particularly are encouraged to submit an application for service on the executive committee.

An application form is included. Please submit a separate form for each committee for which you wish to be considered. The deadline for the receipt of application is March 30, 1983. Applications of those persons not appointed initially will be kept on file during the committee year for consideration if vacancies occur. The application should be addressed to the Department of Sections and Committees, Attention: Appointments, The State Bar of California, 555 Franklin St., San Francisco, CA 94102.

## COMMITTEES

### *Administration of Justice*

Study and report on proposed changes in the law relating to the administration of justice in the civil practice field.

Vacancies: 10

Yearly commitment: 22 meetings

### *Adoptions*

Study and report on proposed changes in the law of adoption and foster care.

Vacancies: 4

Yearly commitment: 5 meetings

### *Alcohol Abuse*

Provide consulting and educational expertise on alcohol abuse to members of the bar and the bench; research and report on the problem of alcoholism; support legislative or administrative solutions to such problems.



Vacancies: 6

Yearly commitment: 8 meetings

*Appellate Courts*

Study an report on proposed legislation, rules of court, organization and procedures of the appellate courts.

Vacancies: 5

Yearly commitment: 6 meetings

*Bar Examiners*

Examine applications and recommend to the state Supreme Court for admission to the bar of those who fulfill the admission requirements; study and report on proposed changes in the law and other matters concerning the requirements of admission to practice law.

Vacancies: 3

Yearly commitment: 12 meetings

*To Confer with the California Medical Association*

Work with a committee of the California Medical Association on matters of mutual concern.

Vacancies: 3

Yearly commitment: 4 meetings

*Condemnation*

Study and report on proposed changes in eminent-domain law and procedure.

Vacancies: 5

Yearly commitment: 5 meetings

*Continuing Education of the Bar Advisory Committee*

Evaluate CEB programs and make recommendations for future programs and related matters.

Vacancies: 5

Yearly commitment: 6 meetings

There also are subcommittee meetings.

*Continuing Education of the Bar Governing Committee*

Responsible for CEB presentations, review of the budget and overall operation of the CEB.

Vacancies: 1

Yearly commitment: 6 meetings

*Environment*

Study and report on proposed changes in the law dealing with environmental issues.

Vacancies: 5

Yearly commitment: 6 meetings

*Fair Trial and Free Press*

Conduct annual bench - bar media conference, discuss possible conflicts between guarantees of fair trial and of free press.

Vacancies: 3

Yearly commitment: 2 meetings

*Federal Courts*

Study and report on proposed changes in the law relating to practice before the federal courts

Vacancies: 5

Yearly commitment: 6 meetings

*Group Insurance Programs*

Study proposed insurance programs for state bar members and make recommendations on improvements in existing state bar-approved group insurance programs.

Vacancies: 3

Yearly commitment: 3 meetings

*History of the Law*

Make recommendations for the preservation of relevant bar historical documents; draft and prepare articles and manuscripts covering past bar activities.

Vacancies: 6

Yearly commitment: 4 meetings

*Human Rights*

Study and report on proposed changes in the law relating to civil rights.

Vacancies: 5

Yearly commitment: 8 meetings

*Juvenile Justice*

Study and report on the administration of juvenile justice for delinquent, dependent and wayward children.

Vacancies: 6

Yearly commitment: 6 meetings

*Judicial Council Advisory**Committee on Legal Forms*

Draft official California court forms required by legislation or court rule and some committee generated forms.

Vacancies: 3

Yearly Commitment: 6 meetings

*Maintenance of Professional Competence*

Implement a voluntary program of continuing education of lawyers; propose rules about accreditation of such program; inform bar members of the program and report to the Board of Governors on the evaluation of such program.

Vacancies: 3

Yearly commitment: 4 meetings

*Professional Responsibility and Conduct*

Issue advisory opinions on questions involving professional ethics submitted by the Board of Governors, local bar associations or individual bar members.

Vacancies: 5

Yearly commitment: 11 meetings

*Public Affairs*

Study and advise on the most effective communication of state bar programs and policies to bar members and the public.

Vacancies: 6

Yearly commitment: 6 meetings

*Rules and Procedures of Court*

Work with BAJI and CALJIC committees in drafting new and revised civil instructions; study and make recommendations for changes in the California Rules of Court.

Vacancies: 5

Yearly commitment: 4 meetings

*Workers Compensation*

Study and make recommendations for change in the law governing workers' compensation.

Vacancies: 4

Yearly commitment: 6 meetings

*Corrections*

Study and make recommendations for changes in the law concerning prison reform.

Vacancies: 4

Yearly commitment: 6 meetings

*Board of Legal Specialization*

Administer the pilot program in legal specialization with the assistance of specialty advisory commissions.

Provide policies and guidelines for certification of specialists; develop and maintain programs of testing, and legal education for specialists. Advise Board of Governors on establishment of specialty fields and appointment of advisory commissions.

Vacancies: 4

Yearly commitment: 10 meetings

*Criminal Law Advisory Commission*

Advise and assist the Board of Legal Specialization in the Administration of the pilot program in criminal law. Pass upon applications for certification as legal specialist, prepare specialist examinations, evaluate and accredit programs of continuing legal education and otherwise administer the program.

Vacancies: 3

Yearly commitment: 8 meetings

*Family Law Advisory Commission*

Advise and assist the Board of Legal Specialization in the administration of the pilot program in family law.

Pass upon applications for certification as legal specialist, prepare specialist examinations, evaluate and accredit programs of continuing legal education and otherwise administer the program.



Vacancies: 3

Yearly commitment: 10 meetings

*Taxation Law Advisory Commission*

Advise and assist the Board of Legal Specialization in the administration of the pilot program in taxation law. Pass upon applications for certification as legal specialist, prepare specialist examinations, evaluate and accredit programs of continuing legal education and otherwise administer the program.

Vacancies: 3

Yearly commitment: 8 meetings

*Workers Compensation Law  
Advisory Commission*

Advise and assist the Board of Legal Specialization in the administration of the pilot program in workers' compensation law. Pass upon applications for certification as legal specialist, prepare specialist examinations, evaluate and accredit continuing legal education programs and otherwise administer the program.

Vacancies: 3

Yearly commitment: 8 meetings

**SECTION EXECUTIVE COMMITTEES**

The section executive committee governs the affairs of the section. Most of these committees meet about nine times a year. In addition, the executive committee coordinates the section's standing committees, educational programs and

membership communications. The following listing contains the areas of interest of each section.

*Antitrust and Trade Regulation Law*

To further the knowledge of section members in antitrust and trade regulation law.

*Business Law*

Corporations; partnerships and unincorporated business organizations; financial institutions; corporate law departments; debtor/creditor and bankruptcy; uniform commercial codes; education; legislation; consumer financial services; revision of non-profit corporation code; cooperative franchise legislation.

*Criminal Law*

Criminal law and procedure; general criminal justice; legislation; public interest and education; federal law and procedure.

*Estate Planning, Trust and Probate Law*

Conservatorship and guardianship; estate planning; legislation; probate; public interest and education; trusts.

*Family Law*

Custody and visitation; support; education and public interest; legislation; newsletter; property division.

*Labor and Employment Law*

Equal employment opportunity/affirmative action; employee rights and benefits; employment contracts;

private collective bargaining; program publications; public collective bargaining.

#### *Law Office Management*

Law office systems and procedures; financial management; physical plant and equipment; research and development; lawyer relationships; client trust-fund administration; local bar law office management speakers bureau; law office economic surveys; lawyer competence.

#### *Legal Services*

Consumer advocacy; criminal defendants; group and prepaid legal services; lawyer referral services; legal problems of aging; legal services for persons with special needs; legal services for the poor; legal services for prisoners; public interest law; legal rights of the handicapped.

#### *Patent, Trademark and Copyright*

Copyright; education; patents; public interest; ethics; trademark.

#### *Public Law*

Administrative law; government contracts; government tort liability; land use and condemnation; political law; working conditions and compensation of publicly employed attorneys.

#### *Real Property Law*

Condominiums and cooperative housing; construction; development and mechanics liens; landlord-tenant and

housing; mobilehome law; real property finance; commercial and industrial development; zoning; land use and environmental regulations.

#### *Taxation*

Income tax; death and gift tax; property, sales and local tax; education; public interest.

---

### ATTACHMENT H

Several new pamphlets will be issued during 1982. They will deal with substantive law topics, including arrest, child custody, immigration law and elderly rights.

State bar-produced radio public service announcements advertise free pamphlets and give legal tips to consumers about their rights and responsibilities under the law. Recorded by professional "voices" and broadcast regularly by more than 50 California radio stations, these 30-second PSAs will generate \$250,000 in free air time for California lawyers this year alone.

In 1982, pamphlets also are being promoted by news releases and law quizzes distributed to general-circulation newspapers, posters in public libraries and social security offices and advertisements in legal publications. Single copies of each pamphlet are provided free to consumers; multiple copies are sold at cost to lawyers, law firms, local bar associations and various institutions and groups.

## IMPROVING THE ADMINISTRATION OF JUSTICE

### *\*Assistance to legislators*

Each year, the state bar assists the legislature by reviewing hundreds of bills and making recommendations to both houses on the merits of many. The bar has sponsored a lengthy list of legislation including:

- A continuous streamlining and updating of small claims court procedures.
- Simplification of probate procedures such as broadening the scope of independent administration of estates, reduction of court involvement, and reform of inheritance tax law.
- The civil arbitration law.
- The attorney-client arbitration law.
- The "long arm" statute.
- Revision of the General Corporation Code and the Nonprofit Corporation Code.
- Creation of the Judicial Performance Commission.
- The Civil Discovery Act.
- Bail reform measures. In fact, the bar has led the bail reform movement since its beginning.

Legislative positions adopted by the bar follow a lengthy process of research and evaluation by state bar sections and committees, usually originated by an inquiry from an individual member of the bar, a legislator, a government agency, or the bar's Conference of Delegates or Board or Governors.

The bar's 11 sections and 22 standing committees work year-round to study and propose improvements in

the law. Last year, more than 500 members of standing committees and sections volunteered more than 34,000 hours to review, research and draft legislative proposals.

At the annual meeting of the bar's Conference of Delegates, 500 representatives of California local bar associations consider more than 100 resolutions – most of which would require legislation to be implemented. Resolutions adopted by the conference are referred for study, recommendation and report to an appropriate state bar section or committee. The Board of Governors and the conference Executive Committee review these reports and place high-priority legislative proposals either on the state bar's legislative program or the conference legislative program.

Bills sponsored by other groups or individual legislators and dealing with the administration of justice, the delivery of legal services, the legal profession or the state bar are monitored closely by the bar's legislative advocate in Sacramento. Bills that would have a significant effect in those areas are referred for study to an appropriate state bar section or committee. In 1981, bar sections and committees reviewed 2,520 bills and amendments and issued reports on approximately 500 of them. On behalf of the state bar, the Board of Governors may support or oppose those bills that impact the legal profession or the practice of law generally, while individual committees and sections are permitted to support or oppose on their own behalf only bills that impact their own areas of expertise.



*\*Assistance to governor*

Under an informal relationship, the bar - on request - provides evaluations and advice to the governor. The requests are directed to an appropriate state bar section or committee for study and in many cases result in a joint effort by the bar and the governor to reform state law. For the past two years, the governor's office has worked closely on a variety of legislative matters with the bar's Family Law and Estate Planning, Trust and Probate sections.

*\*Assistance to Judicial Council*

By law, the state bar appoints four representatives to the state Judicial Council, and the bar's Board of Governors comments on proposed changes in the California Rules of Court and other proposals being considered by the council. Among major items the board has considered are proposals to:

ATTACHMENT I

Seal DEPARTMENT OF SECTIONS AND COMMITTEES  
THE 555 FRANKLIN STREET  
STATE BAR SAN FRANCISCO, CALIFORNIA 94102  
OF CALIFORNIA TELEPHONE (415) 561-8200

DATE: January 20, 1983

TO: Ad Hoc Committee re Committees and Sections

FROM: Russell B. Longaway, Staff Attorney

SUBJECT: Material for Meeting of January 25, 1983

As requested at the last meeting, you will find the enclosed financial material relating to committees and sections within the Department of Sections and Committees. Such material to be reviewed at the January 25, 1983, meeting.

Included are the various program plans of the committees and sections for 1983. Also, enclosed is a cover chart which breaks out the cost of the department and each component committee.

Mr. Emley requested a comparison between the enclosed information which covers 1983 and 1982 actual experience. The following covers the differences:

A. <u>Meetings</u>	<u>1982</u>	<u>1983 (Proposed)</u>
Adoptions	5	6
Appellate Courts	5	6
Courts	2	4
Rules of Court	2	4
Workers Comp	4	6
Antitrust	1	2
Business Law	11	12
Criminal Law	11	10
Labor Law	7	9
Patent	4	3

B. *Staff Time and Overhead* - These figures are substantially the same for the two years.

Total overhead for the department is calculated at \$181,299. This figure represents \$113,933 in salaries covering the officer manager, her secretary. The remaining \$67,366 includes: temporary help, training, stationary, postage, telephones, subscriptions, repair equipment, copier, depreciation, printing and services. Overhead is attributed to committees

and sections in proportion to meeting activity and personnel use.

- C. *Staff Travel* - Staff travel is \$15,980. It is not included in the chart.

The above is not surprising in light of the fact that the department was directed to rollover the 1982 level of activity into the 1983 program plan and budget. The remaining issue is to implement the reduction in travel ordered by the Board. Column one shows an aggregate travel request of \$74,843. The Board reduced this figure by \$20,432 leaving \$54,411. Of the \$20,432 reduction, \$10,830 was projected growth in travel based on the program plans. Almost all of the rest comes from the difference between the 1982 travel budget (\$64,013) and 1982 estimated year-end actual (\$56,493). Therefore, even with the reduction in travel ordered by the Board, there should be sufficient funds for committees to operate at 1982 levels.

---

Seal DEPARTMENT OF SECTIONS AND COMMITTEES  
THE 555 FRANKLIN STREET  
STATE BAR SAN FRANCISCO, CALIFORNIA 94102  
OF CALIFORNIA TELEPHONE (415) 561-8200

---

January 24, 1983

Travel funds available for 1983 = \$54,411  
Requests for travel funds in 1983 proposed  
budget = \$74,843  
(A reduction of \$20,432) as follows:

<u>Committee</u>	<u>Travel Request</u>	<u>Recommended Travel</u>
CAJ	\$ 5,979	\$ 5,979
Adoptions	5,728	4,100
Appellate Courts	5,640	5,000
CMA	2,287	1,500
Condemnation	3,548	3,548
Corrections	10,750	5,000
Courts	3,760	3,760
Environment	7,740	5,000
Fed Courts	5,640	3,800
History of Law	5,640	4,000
Juv. Justice	11,780	6,150
Rules of Court	1,660	500
Worker's Comp	4,691	3,500
Total	<u>\$74,843</u>	<u>\$51,837</u>

RBL/dc

---

Seal DEPARTMENT OF SECTIONS AND COMMITTEES  
THE 555 FRANKLIN STREET  
STATE BAR SAN FRANCISCO, CALIFORNIA 94102  
OF CALIFORNIA TELEPHONE (415) 561-8220

---

November 8, 1982

TO: Board Committee on Legislation  
Board Committee on Public Affairs &  
Communications

FROM: Russell B. Longaway

SUBJ: 1983 General Fund Resource Requests from  
the Committees and Sections

Attached you will find the narrative statements of the  
1983 program plans for the committees and sections.

These were prepared pursuant to the Committee Evaluation Procedure adopted by the Board in May, 1982, to be used in conjunction with the State Bar budget process. The first two pages summarize the requests for meeting travel funds and staff in table form. Certain committees have requested additional resources for extraordinary projects, e.g., Commission on Corrections prison tours. All such requests have been included in the appropriate committee budget line item.

All committee and section requests have been included in the 1983 budget as proposed and the proposed 1983 budget of Sections and Committees closely approximates the 1982 budget.

The following comments relate to the proposed program plans:

*Alcohol Abuse* – The alcohol abuse program is requesting \$86,929; its budget for 1982 is \$45,194. The increase is based upon the addition of one consultant and funds to implement the rest of its charter.

The chair will make a presentation on the work of the program to the full Board on November 19.

*Continuing Education of the Bar* – The CEB program plan is included as agenda 403.

*Federal Courts* – There is no program plan other than that reflected on the enclosed table, i.e., 6 meetings and staff time. The committee expects no change in function for 1983.

*History of Law in California* – The committee will meet according to its normal schedule (4 times). Other projects

include oral histories. It is not possible to predict at this time if this program will incur any extraordinary cost.

*Rules and Procedures of Court* – This committee reviews amendments to the Rules of Court and works with the BAJI committee of the Los Angeles Superior Court. All members are in Los Angeles and the BAJI Committee sends to all members relevant materials. The chair is new and does not project a change in activities for 1983.

#### COMMITTEE SECTION RESOURCE REQUESTS FOR 1983

Committee/ Section	Meetings	Staff Hours		Secre- tarial
		Legal	Adminis- trative	
CAJ	22	1602	0	1602
Adoptions	6	283	0	283
AlcAbuse	7	503	0	189
AppCourts	6	539	0	283
Confer w/CMA	4	50	50	15
Condmation	4	266	0	283
CEB Adv	n/a	0	10	0
CEB Gov	n/a	0	10	0
Corrections	6	396	0	198
Courts	4	50	0	15
Environment	6	634	0	283
FairTrial	2*			
FedCourts	6	283	0	283
HistofLaw	4	0	30	15
HumanRts	n/a			
JuvJust	6	603	0	254
PubAffairs	6*			
Rls of Ct	4	10	0	10
Work Comp	6	114	0	150
SubTotal				
Committee	99	5333	100	3863
		*Comm		
		Dept.		
		budget		



Antitrust	0	339	339
Business	0	848	829
Criminal	905	584	735
Probate	434	641	1112
Family	434	735	981
Labor	0	697	716
Law Ofc Mgt	n/a		
Legal Serv	n/a		
Patent	57	339	377
Public	560	584	660
Real Prop	771	641	1018
Taxation	310	584	660
Sub Total			
Sections	3471	5992	7427
Total	8804	6092	11290

# THE STATE BAR OF CALIFORNIA

San Francisco

## INTER-OFFICE COMMUNICATION

DATE: October 21, 1982

TO: Russell B. Longaway

FROM: Monroe Baer /s/ MB

SUBJECT: CAJ 1982-83 Plan of Operations

Attached is the Committee on Administration of Justice Plan of Operations for 1982-83 which was prepared by its chair, Patrick J. Hoolihan.

You will note that Mr. Hoolihan did not date the report. However, it was mailed to us on October 14, 1982.

Seal

THE COMMITTEE ON ADMINISTRATION

OF JUSTICE OF THE

STATE BAR OF CALIFORNIA 555 FRANKLIN STREET

SAN FRANCISCO, CALIFORNIA 94102

TELEPHONE (415) 561-8220

## COMMITTEE ON THE ADMINISTRATION OF JUSTICE PLAN OF OPERATIONS 1982-83

The Committee on the administration of Justice submits the following Plan of Operation for the year 1982-83:

### 1. ITEMS TO BE HANDLED.

a) There are approximately 10 items carried over from last year, including major projects such as a report and recommendations regarding the discovery process and recommendations regarding the study of the use of cameras in the courtrooms. Each of the items carried over will require substantial study, conferences, reports, and consideration by the committee as a whole.

b) New matters referred by the Board of Governors or Board Committee on Legislation will number approximately 50 based on prior years. Each of these will require substantial study and analysis and recommendations.

c) There are usually 2 to 3 referrals from the Law Revision Commission, some of which require substantial study, such as the class action legislation, comprehensive statute on enforcement of judgments, and similar matters reviewed by the committee in past years.

d) Resolutions that had been presented to the Conference of Delegates in 1982 but have been revised or need re-drafting will be referred to the committee. The CAJ reviewed and made recommendations as to approximately 50 of these resolutions in 1982 and we would anticipate 10 or more would need review of amendments or redrafting.

e) As in past years, it is anticipated that there will be 45 to 50 resolutions referred to the committee for recommendations from the Conference of Delegates for the 1983 convention.

f) Beginning at the commencement of the legislative session, bills of others will be referred to the committee. In past years, there have been 300 or more referred to the committee. It is further anticipated that this committee will exert more time and effort on the Priority II bills, those to be followed directly by the committee. It is felt that there was not sufficient emphasis on these matters in previous years and, even though these may not be of primary importance to the entire Bar, they are bills which may have a significant impact on civil procedure and evidence.

## 2. METHODS.

The methods to be utilized by the committee during the ensuing year will be similar to previous years. In summary, this will include the following:

a) The committee is divided into 2 sections, of approximately 15 to 16 members each. Major items will be assigned to each section for full study, consideration,

and recommendation. Some items that require a very short response time, such as conference resolutions and most bills of others, will be assigned to one section for primary responsibility and the other section will monitor and review the work of the committee with the primary responsibility. Both sections will take up those items on which there is not a consensus.

b) As in past years, there will be approximately 22 meetings for each section from September to June. In the event that it is necessary, one or more meetings may be held in the summer. These are generally 2-hour meetings every other week.

c) There are a minimum of 2 general meetings, one in December, and one in June. This is necessary to reach a consensus on matters where the sections independently have not agreed, as well as for consideration of items that we have not had sufficient time to handle at one or the other section. It is anticipated that it may be necessary to have a third general meeting sometime in the Spring if the action on conference resolutions or other special items might so require.

d) The committee will have a representative at most BCL and Board of Governor meetings inasmuch as the committee usually has items on each agenda of the BCL. These meetings are usually attended by the Chair, Vice-Chair, or a member with special knowledge or expertise in the item considered.

e) Proper follow-up of Priority II bills of others will require attendance and witnesses at Legislative Committee meetings and such other meetings as may be recommended by the legislative representative of the State

Bar. Such meetings are usually in Sacramento, but may be held in Los Angeles, San Francisco, or elsewhere. The legislative representative has urged greater participation in these meetings to maximize the effectiveness and communication of opinions to the legislature. We expect to give much more substantial emphasis to the Priority II bills of others in providing witnesses, materials, and following up on the status of such bills.

f) In some instances, a representative of the committee will meet with local Bar groups on a specific item of common interest.

### 3. STATE BAR ATTORNEY STAFF SUPPORT.

State Bar attorney staff support is absolutely essential for the continuing effectiveness of the committee. Not only in the preparation and dissemination of the agenda and materials to the members, but also in the maintaining of minutes and records of the committee must staff support be relied on almost exclusively. The staff attorney attends all of the meetings and keeps the minutes. Without complete and accurate minutes prepared almost immediately after each meeting, the opposite section of the committee would not be able to review the considerations and conclusions of the other section and it would become virtually impossible to work out a consensus or isolate problems and issues upon which no consensus could be reached. In addition, by attendance at each meeting, the staff attorney is able to provide input at each meeting as to the considerations and issues on a particular item that cannot be fully delineated in the minutes. The staff attorney will also attend many of the BCL

meetings, when possible, to provide further input to the Chair and Vice-chair and the committee so that the committee's action is consistent with what has been requested.

Several hundred "bills of others" are referred to the CAJ each year. The staff attorney must also determine from the legislative bill service received by the State Bar that these are not other bills which the CAJ should review or are related to bills or other projects of the CAJ.

In all of these functions of the Staff Attorney there is the need for considerable judgment and discretion which could be not exercised properly by a non-lawyer.

### 4. MEMBERSHIP AND SECTIONS.

The committee membership has regularly been approximately 30 to 32 with one-half in the North and one-half in the South. Particular effort has been made to obtain a wider representation of all segments of the Bar on the committee. In some instances, particularly as to geographical areas, this has been difficult because of the time and expense of travel.

Members of each section will correspond or discuss by telephone with the member from the opposite section on items that they are both handling. Such communication, although an expense to the individual members, substantially reduces the need for further joint meetings of both sections of the committee.

The size of the committee at the present time is an optimum number if there is full participation. The practice in the past, and certainly the proposed practice in the



future, is to retain only those members who are willing and able to give the extraordinary commitment of 22 to 25 meetings per year along with the concomitant review of the materials and independent research and analysis on items assigned to each member.

#### 5. EXTRAORDINARY EXPENSES.

Surveys, questionnaires, and similar matters may sometimes be indicated by the nature of the item to be considered. Some of this may be handled by the State Bar staff and staff attorney, but any extensive survey, collating of material, preparation and sending of questionnaires, would necessarily require outside help. An example of such an item is the study of cameras in courtrooms. Not only would expert help be required with regard to the preparation of a questionnaire, dissemination, and collating of replies, but also the statistical value of the survey itself would require expert assistance. Such matters are not done on a regular basis by the committee, but would be special items only when required by assignment such as review of the experience with cameras in the courtroom.

#### 6. BUDGET ITEMS.

Budget items considered separately, include the following:

- a) Travel;
- b) State Bar staff;
- c) Special expense items;
- d) Printing, duplication, postage expenses.

#### MEMO

DATE: November 4, 1982  
 TO: Russell B. Longaway  
 FROM: Jerome Fishkin  
 RE: Committee Budgets and Work Programs  
 1983 Estimates

<u>ASSIGNED GROUP</u>	<u>Staff Attorney Hours</u>	<u>Money</u>
<u>Appellate Courts Committee</u>		
1. Standard Items		
20 bills of others		
(Staff: 18 at 2 hours per)		
2 at 10 hours per)	56	
50 rules of court		
(Staff: 40 at 2 hours		
10 at 10 hours	180	
2 Conference Resolutions		
Staff: 2 at 2 hours	4	
2. Special Items		
a. Rule 15 and Rule 29 Committee Proposals pending at Judicial Council	10	
b. Constitutional amendment on Supreme Court powers (follow-up to SCA 52) as originated by chief justice		
Office time	40	
Sacramento trips		
Staff	10	
Members (2 trips)		\$300

c. Shorter Appellate  
Opinions

(Board granted blanket  
authority November,  
1981.)

Office time	40	
Travel		
Staff	40	\$400
Members		\$250

d. Abolition of Divisions

Staff	30	
Member		\$250

3. Meetings (3 each in L.A. & S.F.  
16 members, 3 of whom are  
out of both L.A. & S.F. travel  
areas.)

\$150 per member, 8 in travel status		\$7200
\$130 per meeting X 6		\$780
Staff - 3 in L.A.	45	\$450
3 in S.F.	24	\$25
Office prep. & report	60	

Condemnation Committee

1. Standard Items

15 bills of others (Staff: 10 at 2 hours 5 at 10 hours)	70
---	----

5 conference resolutions (Staff at 2 hours)	10
--	----

2. Special Items

a. Early vesting of title  
(Board referral, August,  
1982)

Staff	10
-------	----

b. Amendment to CCP 409,  
lis pendens (Tentative  
1983 legislative program  
of the Board of Governors)

Office time	20	
Sacramento travel (staff)	20	\$150
(member)		\$150

c. Substantial Impairment  
legislation

Staff office time	30
-------------------	----

d. Market rate interest.

Staff office	20
--------------	----

e. Lis pendens revision study  
(time reported under Real  
Property Law Section)

3. Meetings. 2 each in S.F. and  
L.A. 15 members, 5 of whom  
are out of both S.F. or L.A.  
travel areas. Each meeting: 5  
at \$150, 5 at \$250, 5 at -0-.

\$2,000 per meeting		\$8,000
4 meetings at \$130		\$520
Staff - 2 in L.A.	30	\$300
2 in S.F.	16	\$15
Office prep. & report	40	

Environment Committee

1. Standard Items
 

Receives about 140 bills annually  
Reports on about 40  
(Staff:

100 at 1 hour		
30 at 2 hours		
10 at 5 hours	210	

2 conference resolutions  
Staff: 2 at 2 hours 4
2. Special Items
  - a. CEQA/EIR Guidelines (per Board Blanket Authority)  
Staff 10
  - b. Substantial Impairment (Staff time reported at Condemnation Committee)
  - c. Tort Liability for Hazardous Waste. New program per request of state Hazardous Waste Management Council.  
Staff time 50
  - d. Water Law. Drafting statutes. Also, program at State Bar Convention.  
Staff office 75  
Staff - Sacramento 30 \$225  
Staff - Anaheim 15 \$150
  - e. Revision of CCP 1085  
Staff 10
  - f. Public Trust Legislation  
Staff 50

## 3. Meeting Schedule

6 meetings - 2 in S.F., 2 in L.A., 2 in Sacramento. The Committee has 17 members and a 90% attendance record. Historically, members do not bill for lunch and, thus, save enough money for one meeting. 4 members in Sacramento, 2 in San Diego, 1 in Santa Barbara.

2 San Francisco meetings (10 at \$150; 2 at \$200; \$130 for meeting room; staff at \$20.	20	\$4,600
2 Sacramento meetings (10 at \$150, 2 at \$200, 1 at \$250; staff at \$75; no meeting room change.	30	\$4,450
2 in Los Angeles 10 at \$150; 3 at \$50. Staff at \$150. Meeting room at \$130.	40	\$3,260
Staff - office prep. & report	90	

ITEM: Adoptions Committee Meetings and Travel

COST: \$5,728

OBJECTIVE: Permit six meetings in the 1982-83 year

METHODOLOGY: The COST amount would be for six meetings. Most of the Committee members are from southern California (seven - south, four - north, two - central California). Therefore, the amount reflects estimated costs for four meetings



in Los Angeles and two in San Francisco.

For San Francisco meetings, estimated costs would be:

Meeting Room	=	\$115.00
Meals (Ten people)	=	85.00
Air Travel (Six people, \$140/ person)	=	840.00
Land Travel (Three people, average 100 mile round trip)	=	70.00
		<u>\$1,110.00</u>

For Los Angeles meetings, estimated costs would be:

Meeting Room	=	\$115.00
Meals (Ten people)	=	85.00
Air Travel (Four people, \$140/ person)	=	560.00
Land Travel (Four people, average 100 mile round trip)	=	92.00
		<u>\$852.00</u>

In addition, the Committee would invite two northern California guests to one San Francisco meeting and a southern California guest to two Los Angeles meetings. Cost of transportation and meals for the first two guests would be \$40.00 and costs for the southern California guest would be \$30.00 for each meeting (\$60.00 total).

ITEM: Photocopying and Postage for Committee on Adoptions

COST: \$292.00

OBJECTIVE: Provide materials for the Committee

METHODOLOGY: Items to be copied and mailed are meeting notices, agendas, minutes, reports to legislators, and Board of Governors, work product of Committee members (i.e. drafts of physician's manual) to each other and to members of the public.

Cost of envelopes included in the supply budget of the Department of Sections and Committees. Estimated copying cost is \$100.00 and postage cost is \$192.00.

Materials usually are copied for 18 people, including staff, master files and Board Liaison.

---

ITEM: SPECIAL PROJECTS of the Committee on Adoptions (Trips to Sacramento; appearance before California Medical Association (CMA) Council)

COST: \$380

OBJECTIVE: To permit Committee members to testify in Sacramento in support of or opposition to bills introduced in the Legislature; to permit a Committee member to appear before the CMA Council.

**METHODOLOGY:** In 1980 and 1981 the Committee sent members to Sacramento to testify on bills relating to adoption, foster care, and surrogate parenting. An average of four trips were made each year. Projecting that four trips may be made in 1983, an estimated cost of \$350.00 is included for this item.

An estimated cost of \$30.00 is included for a Committee member to appear before the CMA Council to discuss a proposed physician's manual on adoptions.

---

**ITEM:** Staff Assistance to Committee on Adoptions

**COST:** To be revealed to the Board of Governors

**OBJECTIVE:** Provide staff assistance to Committee

**METHODOLOGY:** Staff attorney assistance, 15% time; secretary, 15% time

Support provided: Legislative reports on bills of others; drafting or editing of reports to Board of Governors; liaison work with California Medical Association, State Department of Social Services, Board of Governors, private adoption agencies; drafting or editing meeting

minutes; advising Committee of State Bar rules, regulations and procedures; making meeting arrangements; clearinghouse for Committee correspondence.

The staff attorney attends all meetings (unless a conflict causes only partial attendance). Estimated attorney time for this Committee is three days per month.

---

# THE STATE BAR OF CALIFORNIA

San Francisco

## INTER-OFFICE COMMUNICATION

**DATE:** November 8, 1982

**TO:** Board of Governors

**FROM:** Russell B. Longaway

**SUBJECT:** 1983 Program Plan for the Committee on Alcohol Abuse

Attached is the 1983 program plan for the Committee on Alcohol Abuse.

**ITEM:** Consultants

**COST:** \$48,000 (2 full-time consultants) plus \$5,000 in expenses for a total of \$53,000.

**OBJECTIVE:** To establish and maintain a program to assist lawyers and judges suffering from problem drinking.

METHODOLOGY: For the voluntary component of the program to help someone establish a treatment program for themselves. Establish and maintain a network of volunteers to have the capacity for lawyer-helping-lawyer. Establish and maintain a series of closed meetings for lawyers and judges; can be in conjunction with a local bar association.

For the discipline component, the Southern California consultant monitors cases referred from the Supreme Court, State Bar Courts and Bar Examiners. During the history of this relationship, the following number of cases have been referred to the program:

Bar Examiners

10/81 - 09/82 - 24  
10/80 - 10/81 - 8  
10/79 - 10/80 - 14  
10/78 - 10/79 - 8

State Bar Courts

10/81 - 09/82 - 18  
1979 - 1981 - 20

(Note: See page on reverse side for continuation.)

PERSONNEL: Two consultants - each of whom spends 40 hours per week on the program.

NOTES: The committee and staff monitor the performance of the consultants to streamline procedures and make the program more efficient and successful.

Continualtion  
of Methodology:

The consultants deal directly with the persons calling for assistance. The consultants have the discretion to make a determination, according to the needs and situation of the caller as to whether one-on-one counseling is required, suggesting referral for hospitalization, doctor's examination, referral to other members, etc. The consultants should be permitted to continue assisting the caller if that is required on a discretionary basis.

Offices should be maintained (or available) in the major cities for the consultants and staff provided, as needed, for reporting, compiling of statistical information, and other requirements to permit the consultants to devote their full time and energies to assisting members of the bar and bench, as well as the significant others who have sought assistance.

As a long-term goal, the committee foresees a need for consultants in those counties with a significant lawyer population.



ITEM: Committee Meetings

COST: \$8898

OBJECTIVE: Permit entire committee to meet bi-monthly.

METHODOLOGY: The figure reflects 6 statewide meetings in 1983 that are funded. The cost is determined by a formula (see note below). The cost of the meetings for the committee is \$7218.

In addition, \$1680 is included as the amount necessary to invite two resource persons to each meeting. This procedure was first authorized by the the Board Committee on Public Affairs and Communications in 1982. The policy is that the chair may invite resource persons to meetings, provided there is a budget line item for that purpose.

The cost of meetings is relatively high because of the large size of the committee. It is estimated that the committee will be 21 members next year.

The committee will also review legislation. Last year 8 bills were referred to the committee for study and report. All were reported on.

PERSONNEL: N/A

NOTES: The formula for determining meeting costs is:

$$\frac{x}{2} \cdot (.75) \cdot ($140 + $100) = y$$

x = size of committee (1/2 travel)

(.75) = factor for

non-attendance

\$140 = average cost per

member per trip

\$100 = meeting room

y = cost of meeting

---

ITEM: Other Travel

COST: \$5220

OBJECTIVE: To permit the officers and members to travel to local bar associations to assist in setting up lawyer-judge meeting or attend conferences.

METHODOLOGY: Committee members are in a position to assist in activating local bar associations, establishing lawyer-judge meetings or other committee activities. Travel costs are estimated upon one such trip per month for iether the chair or vice-chair and five such trips by other members. The formula rate of \$140-per-trip average is used (\$2380).

In addition, travel funds for attendance at the 8th statewide conference on alcoholism is included (\$2000).

Finally, there is included \$840 for trips to Sacramento to appear before the legislature. This figure assumes 6 such trips. Last year the committee reported on 8 bills.

PERSONNEL: Committee members.

NOTES: N/A

ITEM: Postage/Photocopy

COST: \$610

OBJECTIVE: Mail documents to the committee.

METHODOLOGY: This figure reflects an estimated cost for mailing documents to the committee. These include: meeting notices, agendas, minutes, reports and miscellaneous correspondence.

The cost breakdown is \$535 for postage and \$75 for printing. The cost of envelopes is included in the supply budget of the Department of Sections and Committees.

PERSONNEL: N/A

NOTES: N/A

ITEM: Staff Assistance

COST: Confidential - to be revealed to the Board of Governors.

OBJECTIVE: Provide requisite staff assistance to the committee and the alcohol abuse program.

METHODOLOGY: Staff attorney, 26% time; and secretary, 10% time.

Duties include: contract negotiations, legislative analysis, review of statutes and regulations in health law area, liaison to committee from State Bar/Board of Governors. In addition, all administrative support elements, e.g., agendas, reports, etc.

Roughly speaking, the staff attorney needs to attend all committee meetings (7 meetings at 9 hours each), research and report on about 8 bills per year (8 bills at 5 hours each) and spend approximately eight hours per week reviewing committee documents, e.g., newsletter, manual, giving advice to program consultants and reviewing statutes and regulations. This works out to approximately 503 hours per year or 26% of the net State Bar work year.

The recent addition of a word processing system enables reduced need for secretarial assistance.

PERSONNEL: Staff attorney, secretary.

NOTES: N/A

---

ITEM: Training Manual

COST: \$2350

OBJECTIVE: To make available to the program network and others a detailed procedures manual for helping problem drinkers.

METHODOLOGY: This manual contains a wide range of information. It assumes no knowledge on the part of the reader. Therefore, one who is skilled in these matters may find it rudimentary. It is designed so one can take from it what is needed and leave the rest.

The document is dynamic and changes will probably be made during the year.

Cost factors include binders, printing, mailing (\$5 each), 3-ring binders (\$5 each). It is estimated that these will be 100 copies with updates.

PERSONNEL: Norwood Grisham with the assistance of the committee and others.

NOTES: N/A

---

ITEM: Newsletter

COST: \$641

OBJECTIVE: To create a communications vehicle for those participating in the program. To have an educational medium for local bars and others.

METHODOLOGY: A 2-page newsletter to start with and distribute 8-9 times per year. Bill Lundy of San Francisco has volunteered to be the editor.

The purpose is to be a communication vehicle between the program and interested persons in the legal community and the alcohol treatment industry. Where appropriate, the newsletter will share experiences, exchange ideas on intervention and contain a calendar of events.

The initial distribution will include: the committee, participants in the program, other state and local bars, treatment providers, lawyers' wives and other auxiliary groups, major law firms and judges and county alcoholism administrators. Estimated distribution of 550.

PERSONNEL: Our volunteer editor. State Bar administrative support, including printing and mailing.



NOTES: The cost per newsletter is about 3 cents per page printed and \$20 for envelopes per mailing plus postage. Bulk mail can be used with a unit cost of 4.9 cents resulting in a total estimated postage cost of \$243.

---

ITEM: Hotline Service.

COST: \$1640

OBJECTIVE: To have a 24-hour crisis line for lawyers and judges suffering from problem drinking.

METHODOLOGY: The northern hotline is at the Dorothy Glass Answering Service in San Francisco. When a call comes in, it is referred to Norwood Grisham, who either handles the call or refers to a person in the network.

There is a yellow-page ad in the San Francisco telephone directory.

The answering service is \$45 per month and the telephone is approximately \$15 per month.

In Southern California, calls have been referred to Jack Sanow. This budget item reflects keeping the Northern California telephone (\$720) and adding a similar telephone in Southern California. Telephone service is more expensive in Los Angeles, so \$920 is the projected cost.

PERSONNEL: N/A

NOTES: N/A

---

ITEM: Pamphlet on Alcoholism

COST: \$3500 (for 5000 copies)

OBJECTIVE: Create a pamphlet as a preventive education device to assist in early intervention.

METHODOLOGY: The Committee would work through the Department of Communications to create the pamphlet. It would be done in the same manner as all other State Bar pamphlets.

Cost components include; staff, \$1500; typesetting, \$500; printing, \$1000; distribution, \$500.

PERSONNEL: Part-time of Department of Communications.

NOTES: N/A

---

ITEM: Newspaper Advertisements

COST: \$1140

OBJECTIVE: To place daily ads in *The Recorder of San Francisco* and *The Los Angeles Daily Journal*, communicating the existence of the program.

METHODOLOGY: Place a small-box ad in *The Recorder* of San Francisco and *The Los Angeles Daily Journal*, indicating that confidential help is available for problem drinking. The ad would look substantially as follows:

FREE CONFIDENTIAL  
PROFESSIONAL HELP  
FOR PROBLEM  
DRINKING

CALL: Jack Sanow  
(213) --- ----  
Norwood Grisham  
(415) --- ----

CONSULTANTS  
TO STATE BAR  
COMMITTEE ON  
ALCOHOL ABUSE

The cost for this ad would be approximately \$45 per month for *The Recorder* and \$50 per month for *The Los Angeles Daily Journal*.

Other areas that should be covered, but are not included here, are: Sacramento, San Jose and San Diego. These are not included because I doubt the ability of the program at the present time to respond in those areas.

A long-term goal of the committee is to include this ad in the legal dailies of the major urban areas, including Alameda, Sacramento, San Diego and San Jose.

PERSONNEL: de minimis

NOTES: N/A

ITEM: Research

COST: \$3,000

OBJECTIVE: -Obtain quantitative data on the incidence and prevalence of alcoholism within the profession.

-Hire a consulting firm to develop a way to gather reliable data on the incidence and prevalence of problem drinking in the legal profession (\$1,000).

METHODOLOGY: Project the use of questionnaires either by mail or as an insert in the *California Lawyer*.

It costs approximately \$2,000 per page in the *California Lawyer*. Roughly speaking, to get a valid sample for direct mailing purposes, it would require about 1% of the universe (85000) or 850.

Approximate cost for a direct mail sample would be: questionnaire and cover letter (\$51), envelopes (\$80), labels (\$40) and mailing (\$170 first-class or \$42 bulk mail; also include a postage-paid return envelope, \$170). Total, approximately \$400.

PERSONNEL: N/A

NOTES: N/A

ITEM: Conferences  
COST: \$900  
OBJECTIVE: Address the recognition, intervention and treatment of substance abusing lawyers.  
METHODOLOGY: Have one or two conferences. Either statewide or same conference in two locations.  
 Invite professionals in the field of substance abuse to examine and critique our program. The aim of the conferences will be to educate and inform members of our committee in the alternative intervention and treatment resources available.  
PERSONNEL: Staff support/logistics.  
NOTES: Could be done at State Bar offices in San Francisco and Los Angeles. Cost figure is an estimate based upon travel expense for 5 people (\$700) and materials (\$200).

---

ITEM: Annual Meeting Program  
COST: \$2300  
OBJECTIVE: An educational event for the bar to learn about the State Bar program and problem drinking in general.  
METHODOLOGY: This budget paper assumes a continuation of what was done in the past. The 1983 State Bar Annual Meeting will be held in Anaheim where attendance should be good.

On Sunday, there will be a panel discussion concerning a topical issue. Reserve approximately \$1500 for speaker travel and honorarium.  
 Maintain a booth in the exhibitor area. The booth will have a breathalyzer (or similar machine) with a police officer for demonstration. There will be literature available. No cost for police or machine. \$700 for the booth and \$100 for materials.  
 It is expected that the speaker honorarium will enable the committee to draw a named speaker who, in turn, will attract a larger attendance at the convention.

PERSONNEL: Volunteer labor will staff the booth from 9:00 a.m., Saturday, through 6:00 p.m., Monday.  
NOTES: Committee members are not reimbursed for Annual Meeting expenses.

---

ITEM: Speaker Bureau  
COST: \$1,330  
OBJECTIVE: Make the services of the program known to lawyers and significant others.  
METHODOLOGY: Make arrangements to address local bar associations, major law firms, law schools and any other identifiable legal group.



In addition, the consultants will have training sessions for program volunteers using video tapes. Estimated cost for the video-tape sessions is \$630.

PERSONNEL: Committee members.

NOTES: Cost is an estimate that 5 such speeches might occur at 140 per trip = 700.

It costs \$250 per day to rent video-tape equipment for an audience of 50 people. It is estimated that 2 films will be shown to smaller groups (20) at a cost of \$65. One of each session will be held north and south for a total cost of \$630.

ITEM: Public Service Announcements

COST: None

OBJECTIVE: Let the general public know that intervention and treatment of substance abuses within the legal profession is available.

METHODOLOGY: In cooperation with the Department of Communications, work with various television and radio stations to produce such messages.

PERSONNEL: Committee members.

NOTES: N/A

ITEM: Public Hearings

COST: \$2400

OBJECTIVE: Investigate the incidence, causes, prevention, intervention and treatment of substance abuse problems.

METHODOLOGY: Hearings to receive testimony from experts in the various fields relating to substance abuse. The experts would provide data on these problems, particularly as they relate to the legal profession.

The hearings would be investigative in nature and, therefore, would probably be of interest to the press.

The results would be published in the committee newsletter, *California Lawyer*, presented to the Board of Governors.

This would be an adjunct to the committee mandate to do research in the field.

The public hearings would provide a forum for the release of research data previously gathered by the committee.

PERSONNEL: Committee members

NOTES: Could be held in State Bar offices. Limit cost to committee member travel.

Seal

DEPARTMENT OF SECTIONS  
AND COMMITTEES

THE 555 FRANKLIN STREET  
STATE BAR SAN FRANCISCO, CALIFORNIA 94102  
OF CALIFORNIA TELEPHONE (415) 561-8220

---

September 27, 1982

C. John Tupper, M.D.  
California Medical Association  
731 Market Street  
San Francisco, California 94103

Attention: Bob Hahn

Re: Committee to Confer with the California Medical  
Association; 1982-83 Program Plan and Budget.

Dear Dr. Tupper:

It is necessary for me by October 1, 1982, to reduce to a budget the program plan for the committee for next year. This letter is to confirm the activities of the committee as agreed at your July 28, 1982, meeting.

I am sending a copy of this letter to Charles Jarvis of Santa Barbara, who has been appointed Chair by the bar.

At the July 28th meeting, the following activities were recommended for the 1982-83 committee year (October, 1982 - September, 1983):

1. Survey county medical societies to determine what medical-legal programs they offer or are interested in. To be done by the CMA staff.
2. Prepare white papers on the following subjects:
  - authorization to release medical information;
  - right to refuse treatment;
  - rights of parents to withhold treatment for severely deformed infants;

- re-evaluate the removal of life support systems;
- role of the physician re cults.

Legal research to be done by State Bar staff attorney.  
CMA staff to assist in other areas.

It is necessary for me to reduce the above program to a budget. I anticipate the above to require at least four meetings of the committee. Research time for State Bar staff on the white papers is expected to be at least 50 hours. If you have any comments, please let me know as soon as practicable.

Very truly yours,

/s/ Russell B. Longaway  
Russell B. Longaway  
Staff Attorney

RBL:vj

cc: Charles H. Jarvis  
Box 1260  
Santa Barbara, California 93102

## COMMISSION ON CORRECTIONS

ITEM: Commission MeetingsCOST: \$7,950OBJECTIVE: Permit entire Commission to meet six times during the year.

METHODOLOGY: The figure reflects six statewide meetings in 1983. The cost is determined by a formula (see note below). The cost of the meetings for the Commission is \$7,950.

In addition, \$280 is included for each meeting as the amount necessary to invite two ad hoc advisors to each meeting. This procedure was first authorized by the Board Committee on Public Affairs and Communications in 1982. The policy is that the Chair may invite resource persons to meetings, provided that there is a budget line item for that purpose.

The cost of meetings is relatively high because of the geographical distribution of members of the Commission. It is estimated that nine of the Commission members will be in travel status for any given meeting.

NOTE: The formula for determining meeting costs for the Commission on Corrections is:

$$(9 \times .75 \times 140) + 100 = y$$

$$(9 \times .75 \times 140) + 100 = \$1,045$$

9 = number of Commission members who are in travel status

.75 = factor for attendance

140 = average travel cost per member per trip

100 = cost of meeting room

y = base cost of meeting

PERSONNEL: N/A

---

## COMMISSION ON CORRECTIONS

ITEM: Staff Assistance

COST: Confidential

OBJECTIVE: Provide requisite staff assistance to the Commission in its compliance with its responsibilities to the Board of Governors.

METHODOLOGY: Staff attorney, 21% time; and secretary, 10.5% time

Duties include legislative analysis, review of statutes and regulations in corrections area, preparation of reports on bills of others, liaison between Commission and State Bar Board of Governors, liaison between State Bar and corrections organizations and community.

In addition, all staff support with regard to agendas, meeting preparations, special reports, Commission appointments, and responses to inquiries from the public.

Coordination of the prison diet study, liaison and research on prison overcrowding, development of general Commission positions on legislation, and legal services delivery analysis.

PERSONNEL: Staff attorney, secretary.

---



## COMMISSION ON CORRECTIONS

ITEM: Special Projects (Trips to Sacramento and other Legislative or Administrative Hearings)

COST: \$2,800

OBJECTIVE: To permit Commission members to make two prison tours and to testify at legislative or administrative hearings regarding legislation or administrative regulations.

METHODOLOGY: The Commission members have made at least two prison tours during the years since the Commission was first created. This has enabled improved communication between members of the Bar and the Department of Corrections. The figure of \$2,100 would cover the cost of two prison tours.

In the past, members of the Commission have testified at both legislative and administrative hearings throughout the state regarding inmate labor, prison rights and privileges, and prison diet. The Commission expects to continue its participation at these hearings.

The figure of \$700 would cover the cost of five trips to Sacramento at an estimated \$140 cost per trip. The Commission provided testimony on three bills last year and next year is expected to be an extremely busy year for corrections bills.

## COMMISSION ON CORRECTIONS

ITEM: Photocopy

COST: \$176.06

OBJECTIVE: To provide the requisite photocopying for the functioning of the Commission on Corrections.

METHODOLOGY: #Pages x .022¢/page x  
#Copies = Cost

Agenda, Notice  
and Minutes (10 x .022 x 19) x 6 meetings = \$ 25.08

## Mailings:

Regulations 120 x .022 x 19 = 50.16

Special Reports 60 x .022 x 6 = 7.92

Correspondence 137 x .022 x 6 = 18.08

## Miscellaneous

Mailings 179 x .022 x 19 = 74.82

Total \$176.06

## COMMISSION ON CORRECTIONS

ITEM: Postage

COST: \$238.80

OBJECTIVE: To provide necessary assistance in communications

METHODOLOGY: Estimating approximately four mailings a month at different weights in addition to distribution of bills reports.

#Mailings x Cost per item x  
#Copies x 12 months = Cost

2 x .30 x 19 x 12 = \$136.00

2 x .20 x 19 x 12 = 91.20

12 x .30 x 3 = 10.80  
\$238.80

Seal

DEPARTMENT OF SECTIONS  
AND COMMITTEES

THE 555 FRANKLIN STREET  
STATE BAR SAN FRANCISCO, CALIFORNIA 94102  
OF CALIFORNIA TELEPHONE (415) 561-8220

September 28, 1982

Joseph H. Cummins, Chair  
888 West Sixth Street  
Los Angeles, CA 90017

Re: 1982-83 Courts Committee Program Plan

Dear Joe:

Since Dave Heilbron will be unavailable, I have to rely on you to prepare the program plan and budget request for the committee for the next year.

The first step in the analysis is the overall objective of the committee. Based upon the experience of last year, I do not believe the committee is in a position to generate legislative court reform proposals. There is no consensus.

The committee is in a position to provide a cross-section opinion on bills of others.

The Judge Watt backlog reduction program is self-sustaining. Judge Watt finds committee support valuable but does not appear to require the active assistance of the committee.

There has not yet been a thorough examination by the committee of possible reforms in the criminal law area. A new prosecutor from San Diego has just been appointed. He may be the catalyst for that type of review.

The above leads me to the following conclusions regarding the 1982-83 committee year:

1. The committee should meet 4 to 5 times this committee year.
2. The committee should provide comment on *significant* court reform bills of others. Since they will all be introduced by late February, the committee should plan meetings in late February and – if there is sufficient reason – in late March to timely comment on such bills.
3. The committee should re-affirm support of the May, 1981, report re backlog reduction and provide Judge Watt whatever assistance he may require.
4. There should be 2 meetings devoted to a review of the court system, an identification of problems and recommended solutions for the Board of Governors to implement.

The above plan contemplates four meetings and no travel to Sacramento on legislative matters.

Please let me know if you object to this plan or have modifications. If there are no objections, I will prepare the committee budget to reflect the above.

Very truly yours,

/s/ Russell  
Russell B. Longway  
Staff Attorney

RBL:vj  
cc: David M. Heilbron

---

J. HART CLINTON  
1080 South Amphlett Boulevard  
Post Office Box 5400  
San Mateo, California 94402  
(415) 348-4356

September 17, 1982

State Bar Ad Hoc Committee Re Sections and Committees  
State Bar of California  
555 Franklin Street  
San Francisco, California 94102

Attention: Russell B. Longaway, Staff Attorney

Reference: Budget of State Bar Committee on Fair Trial  
and Free Press for 1982-83 Calendar Year

Dear Sirs:

By memorandum dated August 31, 1982 to the Chairs and Vice-Chairs of State Bar Standing Committees submitted by Russell B. Longaway, Staff Attorney, and at the meeting designated in that memorandum held in Sacramento on Saturday, September 11, 1982, it was requested that all

committee chairmen submit a budget for their committee no later than October 1, 1982.

In response to this request, and as Chairman of the State Bar Committee on Fair Trial and Free Press, I wish to advise as follows:

The committee will have no more than two meetings during the calendar year 1982-83. One of these meetings will be participation in the Statewide Bench-Bar-Media Committee meeting usually held in the spring of the year and which will probably be held in April of 1983. The other meeting will be a meeting of the committee at the State Bar convention.

Attached is a letter dated July 1, 1982 to Ms. Mary A. Tan Yen, Staff Attorney of the State Bar of California, in which I made my recommendations for the composition of the committee for the ensuing year. At Sacramento during the State Bar convention I was advised by Board liaison member Marta Macias that my recommendations to Mary A. Tan Yen were submitted to the Board of Governors and approved.

The only expenses of the committee in connection with its work in 1982-83 will be travel time for those attending the Statewide Bench-Bar-Media Committee meeting and the rental cost of a hotel room at the San Francisco Airport. I would refer the State Bar staff to its records of compensation for committee members during prior years for an estimate of the amount to be paid for travel time. The cost of the hotel room at the San Francisco Airport for the Statewide Bench-Bar-Media meeting which was held in April of 1982 was paid by the San Mateo Times, of which your Chairman is Editor and Publisher, and it



amounted to \$505.14. However, I would expect that in the future it will be paid by the State Bar of California.

The amount of staff time required in servicing the committee is minimal and consists principally in mailing a notice and a proposed agenda to committee members and attending the Statewide Bench-Bar-Media meeting held in the spring, as well as attending the committee meeting at the State Bar convention. I have no record myself of the amount of staff time involved and the staff can make the best estimate of the amount of time they devote to this work, but according to my observation it is minimal.

Attached to this report also is a Summary of Activities of the State Bar Committee on Fair Trial and Free Press for the Year Ended June 30, 1982, which sets forth in summary form the activities of the committee during the past year and the general purposes of the committee's work.

I note that in the evaluation procedure adopted on May 1, 1982 by the Board, it was suggested in Item 3 that at the end of the committee year a report be submitted to the Board on how close to expectation the committee performed. That report will be submitted at the conclusion of the committee year.

Our committee works closely with Ms. Paulette Eaneman and Ms. Esther Mamet, Staff personnel of the State Bar of California. No volunteers are needed and the members of the committee are quite qualified to perform the committee work which, as you will note in the Summary of Activities, consist principally of developing and maintaining a dialog with the media, both print and electronic, and also monitoring the work of the County Bench-Bar-Media Committees throughout the State of California.

If there are any additional questions regarding the scope of the committee's work or the costs involved in performing its work, please advise.

Respectfully submitted,

/s/ J. Hart Clinton lh  
J. Hart Clinton  
Chairman  
State Bar Committee on Fair Trial and Free Press

JHC:lh  
Enclosures

---

J. HART CLINTON  
1080 SOUTH AMPHLETT BOULEVARD  
POST OFFICE BOX 5400  
SAN MATEO, CALIFORNIA 94402  
(415) 348-4356

July 1, 1982

Ms. Mary A. Tan Yen  
Staff Attorney  
State Bar of California  
555 Franklin Street  
San Francisco, California 94102-4498

Dear Ms. Yen:

Esther L. Mamet, Manager, Administrative Services, wrote to me on June 22, 1982 at the request of Paulette Eaneman, submitting a list of committee members of the Committee on Fair Trial and Free Press. I have been asked to give my recommendations on reappointments to you.

Confirming my telephone conversation of even date, may I first call to your attention that two of the persons named

on Esther Mamet's list are no longer members of the committee, namely, Ronald E. Blubaugh and Howard J. Klein. They were appointed by the Board of Governors in February 1982 on the mistaken assumption that they were previously members for the Special Committee to Confer with the Media. Therefore please delete Ronald E. Blubaugh as well as Howard Klein from the list.

I would ask that the remaining members be reappointed, namely:

Myself as Chairman;  
Past President John H. Finger;  
Past President A. Stevens Halsted, Jr.;  
Ronald W. Hutcherson;  
Robert A. Mackey;  
Jessica Perrin Silvers;  
Harry B. Sondheim;  
Past President John A. Sutro; and  
Ronald G. Wrinkle.

In addition, I would recommend the following appointments to take the place of Ronald E. Blubaugh and Howard J. Klein:

1. *Douglas T. Foster, Esq.* of the law firm of Diepenbrock, Wulff, Plant & Hannegan, 455 Capital Mall, Suite 800, Sacramento, California 95814.

A resume of Douglas Foster and my reasons for suggesting his appointment are set forth in a separate attachment.

2. *Honorable Melvin E. Cohn*, Judge of the Superior Court, Hall of Justice & Records, 401 Marshall Street, Redwood City, California 94063.

Likewise, a resume and summary of the reasons why I recommend Judge Cohn is included as a separate attachment.

I have not discussed the possibility of appointment with either Mr. Foster or Judge Cohn as I thought it would be unwise to do so before the Board considered the matter.

If you need any further information, please let me know.

Respectfully yours,

J. Hart Clinton  
Chairman

State Bar Committee on Fair Trial and Free Press

JHC:lh  
Enclosures

cc: Samuel L. Williams, Esq.  
Mary G. Wailes  
Paulette Eaneman

---

RESUME OF DOUGLAS T. FOSTER  
AND REASONS FOR RECOMMENDING  
HIS APPOINTMENT TO THE STATE BAR COMMITTEE  
ON FAIR TRIAL AND FREE PRESS

---

Douglas Foster is a member of the law firm of Diepenbrock, Wulff, Plant & Hannegan, 455 Capital Mall, Sacramento, California 95814.

For many years he has been doing legal work for the Sacramento Bee and has been involved in many fair trial-free press matters. He is interested in this type of work and I believe would make a real contribution to the work of the committee.

He recently was involved in the petition of the Sacramento Bee for certiorari to reverse a decision of the Court

of Appeals of the 9th Circuit involving the ejection of a Sacramento Bee reporter from the Sacramento District Court during a pretrial hearing.

I have known Mr. Foster for many years and consider him an excellent attorney. He is also, as you will see, a partner of Past President Forrest Plant.

Respectfully submitted,  
/s/ J. Hart Clinton  
J. Hart Clinton  
Chairman  
State Bar Committee on Fair  
Trial and Free Press

---

RESUME OF JUDGE MELVIN E. COHN  
AND REASONS FOR RECOMMENDING  
HIS APPOINTMENT TO THE STATE BAR COMMITTEE  
ON FAIR TRIAL AND FREE PRESS

---

Judge Melvin E. Cohn is a highly respected Superior Court judge in San Mateo County, whose address is Hall of Justice & Records, 401 Marshall Street, Redwood City, California 94063.

Prior to his appointment to the bench, he was City Attorney for the City of San Carlos.

He has been Co-Chairman of the San Mateo County Bench/Bar/Media Committee for several years and has contributed greatly to a better understanding of the need for reconciling differences between fair trial and free press, and the necessity for lawyers, judges and the

media to understand the constitutional right to a fair trial as well as the media's constitutional right to a free press.

I believe that with Judge Cohn's background he would make an excellent contribution to the work of the committee.

Respectfully submitted,  
/s/ J. Hart Clinton  
J. Hart Clinton  
Chairman  
State Bar Committee on Fair  
Trial and Free Press

---

J. HART CLINTON  
1080 SOUTH AMPHLETT BOULEVARD  
POST OFFICE BOX 5400  
SAN MATEO, CALIFORNIA 94402  
(415) 348-4356

July 15, 1982

Board of Governors  
State Bar of California  
555 Franklin Street  
San Francisco, California 94102-4498

Re: Summary of Activities of the State Bar Committee  
on Fair Trial and Free Press For the Year Ended  
June 30, 1982.

Dear Sirs:

In accordance with the request of William B. Eades that the Chair of the State Bar Committee on Fair Trial and Free Press submit a summary of activities for the past year (fiscal year ending June 30, 1982), I am pleased to



enclose herewith a summary of such activities as requested.

Respectfully yours,

/s/ J. Hart Clinton  
J. Hart Clinton  
Chairman  
State Bar Committee on Fair  
Trial and Free Press

JHC:lh  
Enclosure

---

SUMMARY OF ACTIVITIES OF THE  
STATE BAR COMMITTEE ON FAIR TRIAL AND  
FREE PRESS FOR THE YEAR ENDED JUNE 30, 1982

---

The Committee was originally established as a Special Committee to Confer with the Media in 1968, at a time when there was much concern on the part of the media with respect to the recommendation of the American Bar Association that trial judges should include among remedies for ensuring a fair trial, the issuance of protective orders which would prohibit court personnel, witnesses, jurors and attorneys from discussing the trial proceedings with the press. Such protective orders are called "gag orders" by the media. The American Bar Association report was issued on the recommendation of a special committee headed by Justice Paul Reardon of the Supreme Judicial Court of Massachusetts and is known as the "Reardon Report".

The action of the American Bar Association followed the reversal of the conviction of Dr. Sam Sheppard in the

case of *Sheppard v. Maxwell* (384 U.S. 333, decided June 6, 1966). Dr. Sheppard's conviction was overturned by the U.S. Supreme Court because of massive pretrial prejudicial publicity on the part of the Cleveland press. When retried, Dr. Sheppard was acquitted.

When the Reardon Report was issued I expressed concern to the incumbent State Bar President John Finger that if the Board of Governors of the State Bar of California adopted the Reardon Report that it was bound to develop hostility between the bench, bar and media with respect to First Amendment rights to a free press and Sixth Amendment rights to a fair trial. Mr. Finger responded by appointing the Special Committee to Confer with the Media with myself as Chairman.

Shortly thereafter, our Special Committee went to work with the various media organizations, the California Association of Judges, and representatives of the State Judicial Council, and developed a document entitled "Joint Declaration Regarding News Coverage of Criminal Proceedings in California", copy of which is attached. The Statement of Principles was endorsed February 15, 1970 by the Board of Governors of the State Bar, the various media committees participating in the development of the Joint Declaration, the Executive Board of the Conference of California Judges, and was given favorable recognition by the Judicial Council at its May 1970 meeting.

Thereafter the Special Committee met twice a year with representatives of the various organizations which participated in developing the Joint Declaration for the

purpose of discussing and, where possible, resolving differences between the media and the bar respecting fair trial/free press. One of these meetings was an Executive Committee meeting with a smaller number in attendance, and the second meeting was a full meeting of all representatives of the various organizations participating in the development of the Joint Declaration, including the chairs of various county bench/bar/media committees which have been organized with the encouragement and help of your chairman.

As a result of these meetings of the Special Committee to Confer with the Media and the other participants named above, and as a result also of the county committees which were developed and monitored by the State Bar Committee, the conflict between the bench, bar and media regarding fair trial and free press was greatly diminished, the number of gag orders was greatly reduced, and claims of prejudicial publicity by the bar and by the judiciary were substantially reduced.

Your Chairman was Chair of the Special Committee throughout the entire period from 1968 until the termination of the committee by the Board of Governors at its September 1981 meeting, except for one brief interlude when former State Bar President John Sutro chaired the committee.

At its September 1981 meeting, the Board terminated the Special Committee to Confer with the Media pursuant to a policy of reducing the number of special committees where it was not apparent to the board that such committees served any special purpose. Your Chairman objected to this termination and there were also objections from

various members of the bar, the media and the judiciary, as a result of which the board reestablished the committee as a Standing Committee at its February 1982 meeting.

The present Standing Committee will continue to carry on the functions which were previously performed by the Special Committee to Confer with the Media and will meet as frequently as is necessary in order to maintain a relationship with the media which it is hoped will continue to resolve and reduce differences between the bench, bar and media regarding fair trial and free press.

The committee is currently scheduled to have a meeting during the State Bar convention in September 1982, after which the committee will participate in a meeting of the Statewide Bench/Bar/Media Committee for the purpose of continuing its dialog with the judiciary and the press for the purposes stated above.

The Chair of the committee is grateful to the Board of Governors for its action in reestablishing the committee as a Standing Committee and you have the assurance of the Chair that the committee will continue with its constructive activities in the field of fair trial and free press.

Respectfully submitted,

/s/ J. Hart Clinton  
J. Hart Clinton  
Chairman  
State Bar Committee on Fair  
Trial and Free Press

---

## COMMITTEE ON JUVENILE JUSTICE

ITEM: Committee MeetingsCOST: \$10,380OBJECTIVE: Permit entire Committee to meet six times during the year at least possible cost.METHODOLOGY: The figure reflects six statewide meetings in 1983. The cost is determined by a formula (see note below). The cost of the meetings for the Committee is \$10,380. A savings would result if all meetings were held in the South.

In addition, \$140 is included for each meeting as the amount necessary to invite one ad hoc advisor to each meeting. This procedure was first authorized by the Board Committee on Public Affairs and Communications in 1982. The policy is that the Chair may invite resource persons to meetings, provided that there is a budget line item for that purpose.

The cost of meetings is relatively high because of the large size of the Committee. The Committee has 19 members. The Committee could function with fewer members but it would find it very difficult to function if communication were limited to the mail and conference calls. In addition, 16 Committee members will be in travel

status for meetings held in the North and 12 will be in travel status for meetings held in the South. The total cost is based on the expectation that three meetings will be held in the North and three meetings will be held in the South.

NOTE: The formula for determining meeting costs for the Committee on Juvenile Justice is:

$$(X \times .75 \times 140) + 100 = y$$

Meetings held in the North:

$$(16 \times .75 \times 140) + 100 = \$1,820$$

Meetings held in the South:

$$(12 \times .75 \times 140) + 100 = \$1,360$$

X = number of Committee members who are in travel status

.75 = factor for attendance

140 = average travel cost per member per trip

100 = cost of meeting room

y = base cost of meeting

## COMMITTEE ON JUVENILE JUSTICE

ITEM: Staff assistanceCOST: ConfidentialOBJECTIVE: Provide requisite staff assistance to the Committee in its compliance with its responsibilities to the Board of Governors.METHODOLOGY: Staff attorney, 32% time; and secretary, 13.5% time.



Duties include legislative analysis, review of statutes and regulations in area of juvenile justice, preparation of reports on bills of others, liaison between Committee and State Bar Board of Governors.

In addition, all staff support with regard to agendas, meeting preparations, special reports, Committee appointments and responses to inquiries from public.

Coordination of the legislative program, affirmative legislative proposals, development of general Committee positions on legislation and project to revise a major part of the Welfare and Institutions Code.

PERSONNEL: Staff attorney, secretary.

#### COMMITTEE ON JUVENILE JUSTICE

ITEM: Special Projects (Trips to Sacramento and other Legislative or Administrative Hearings)

COST: \$1,400

OBJECTIVE: To permit Committee members to testify at legislative hearings regarding bills of others.

METHODOLOGY: The Committee has provided testimony in the past regarding the juvenile court system, child abuse reporting requirements,

dependency procedures and mandatory juvenile sentencing. The Committee anticipates continuing its participation at these hearings.

The figure of \$1,400 would cover the cost of ten trips to Sacramento at an estimated \$140 cost per trip. The Committee reported on 50 bills of others last year.

#### COMMITTEE ON JUVENILE JUSTICE

ITEM: Photocopy

COST: \$386.21

OBJECTIVE: To provide the requisite photocopying for the functioning of the Committee on Juvenile Justice.

METHODOLOGY: #Pages x .022¢/page x  
#Copies = Cost

Agenda, Notice  
and Minutes (15 x .022 x 30) x 6 meetings = \$59.40

#### Mailings:

Special Reports 250 x .022 x 7 = 38.50  
Correspondence 295 x .022 x 7 = 45.43

#### Miscellaneous

Mailings 368 x .022 x 30 = 242.88

Total \$386.21

## COMMITTEE ON JUVENILE JUSTICE

ITEM: PostageCOST: \$585.00OBJECTIVE: To provide necessary assistance in communicationsMETHODOLOGY: Estimating approximately four mailings a month at different weights in addition to distribution of bill reports.

#Mailings x Cost per item x #Copies x 12 months = Cost

2 x .30 x 30 x 12 = \$216.00

2 x .45 x 30 x 12 = 324.00

50 x .30 x 3 = 45.00  
\$585.00

## THE STATE BAR OF CALIFORNIA

San Francisco

## INTER-OFFICE COMMUNICATION

DATE: October 7, 1982

TO: Russell B. Longaway

FROM: Paulette S. Eaneman

SUBJECT: 1982-1983 Committee Plans, Budgets

Here is a copy of the "Committee on Public Affairs Operating Plan 1982-1983," prepared by Chair Jeanne L. Arthur of Palo Alto. I believe you already have received a copy of the plan for the Committee on Fair Trial/Free Press, chaired by J. Hart Clinton of San Mateo. Both of these committees are staffed through the State Bar's Office of Bar Communications & Public Affairs. Initial

budget projections are summarized below; final figures will be available by October 15, 1983.

## Committee on Public Affairs

Staff support \$2,653  
(Represents 10 per cent of salary, taxes, fringes for the Senior Administrative Assistant who staffs this committee.)

Committee travel \$8,637  
(Allows for six meetings and assumes that of 15 committee members, 11 will attend and seven will travel.)

Travel-catering \$1,100  
(Covers cost of catered lunches and room rental on the one occasion when the committee meets at the Los Angeles airport.)

## Committee on Fair Trial/Free Press

Staff support \$1,327  
(Represents 5 per cent of salary, taxes, fringes for the Senior Administrative Assistant who staffs this committee.)

Committee travel \$1,268  
(Allows for two meetings and assumes that of 11 committee members, nine will attend and six will travel.)

Travel-catering \$270  
(Covers cost of room rental for one meeting.)

If you have questions, please let me know.

### Committee on Public Affairs Operating Plan 1982-1983

#### Introduction-description of committee activities

The Committee on Public Affairs exercises general oversight responsibility for all media relations and public education programs of the State Bar as well as the development and maintenance of effective communication between the State Bar and its membership and between the State Bar and local, specialty and minority bar associations. The Committee is concerned both with specific programs and with the provision of communication services to other departments and divisions of the State Bar.

In carrying out its duties, the Committee develops new program ideas and methods. It also conducts studies and reports to the Board on issues that have a significant public relations impact.

The Committee meets six times a year. In addition Committee members prepare studies and reports in their own offices and conduct subcommittee discussions by correspondence or by telephone. The chairman and the vice-chairman frequently attend Board Committee meetings to present Committee reports and to maintain effective liaison with the Board.

The Committee is authorized for fifteen members which has proved over the years to be close to an optimum number.

Because of the number of staff reporting to the Committee and the policy discussions which the committee must undertake, the Committee must meet as a whole.

### Budget

The Committee budget is part of the larger budget of the Office of Public Affairs whose fulltime staff provide staff support to the Committee. The portion of the budget denominated "committee" has traditionally included only that portion of the budget necessary to conduct committee meetings and prepare committee reports, including committee travel to Board meetings and excluding staff travel which is covered elsewhere in the budget. The quantity and type of staff support provided to the committee depends upon the determination of the type and scope of projects and programs to be undertaken by the office of Public Affairs as a whole and is budgeted by the staff with the advice and recommendations of the committee.

#### Program Plan 1982-1983

The Committee is an oversight and policy committee. The matters that arise in the course of program operation and the policy matters referred by the Board cannot be determined in advance. The Committee agenda for any given year is therefore subject to amendment as the year progresses. Beginning the 1982-1983 year, the Committee has the following items on its agenda:

Continuing review, oversight and development of existing programs and services

Program development assistance to new media relations director

Design of program for publication and distribution of pamphlets in other languages



Policy review and recommendations regarding requests for co-publication arrangements with other bars (pamphlets)

Reinstitution of Golden Medallion Media Awards program

Feasibility and development study of additional public education and media relations programs and services

---

MENTZ, FINN, GILBERT & CLARKE  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
883 SNEATH LANE  
SAN BRUNO, CALIFORNIA 94066

Arnold H. Mentz	San Francisco
Thomas M. Finn	(415) 761-1200
Nathan A. Gilbert	Peninsula
Thomas E. Clarke	(415) 873-2882
J. Joseph McDowell	
Sherry L. Newton	San Jose
Anthony T. Topolsky	(408) 988-7866
Dorothy Anderson North	

September 24, 1982

Committee on Workers' Compensation  
State Bar  
555 Franklin Street  
San Francisco, California 94102

Attn: Russell Longaway

Re: Budget

Gentlemen:

It appears that the committee will be dealing with a number of bills in the legislature. I would estimate that

there will be in the neighborhood of twenty to twenty-five bills referred to the committee.

Further the committee will need to deal with any activity on the Auditor's General report that may develop in Sacramento. This is a little uncertain as to what activity there may be but I would estimate that it would necessitate perhaps two to three visits to Sacramento.

Further the committee this year it is hoped will originate proposals for new legislation in a number of areas. While the committee will need to establish priorities and perhaps focus its attention in one or two areas it would appear that there are five or six separate areas in which the committee members have concerns and for which legislation may be proposed. If that occurs, there may be necessity for meetings and other trips to Sacramento to attempt to push committee sponsored legislation forward.

On a routine basis I would expect that the committee will need to meet four times during the next year. I would also expect that there might be one or possibly two special purpose meetings that may be necessary.

If you need any additional information from me please let me know.

Also, I would appreciate if the names of the committee members are available that I could receive that.

Thank you.

Yours very truly,

/s/ Thomas E. Clarke  
THOMAS E. CLARKE

TEC/ar

---

November 4, 1982

Russell B. Longaway

Jerome Fishkin

Attorney Time and Travel - Assigned Sections.  
Estimates for 1983

<u>Item</u>	<u>Time</u>	<u>Money</u>
<u>Public Law</u>		
1. Regular Items		
Receives about 100 bills of others and reports on about 20. In 1983, staff counsel is the legislative screener.		
80 at 2 hours		
10 at 3 hours		
10 at 5 hours	260	
Receives about 50 proposed changes and additions to administrative regulations. Staff does initial screening.		
40 at 2 hours		
10 at 3 hours	110	
Receives about 5 conference resolutions		
5 at 2 hours	10	
2. Special Items		
a. Annual survey of wages and working conditions of public attorneys	40	

b. Lis Pendens revision (time reported at Condemnation Committee)

## 3. Meeting Schedule

6 meetings including State Bar Convention. 3 in S.F., 2 in L.A., 1 in Anaheim.

S.F. - 3 at 4 hours		
3 hours - follow up reports	21	\$21
L.A. - 2 at 10 hours		
3 hours - follow up reports	26	\$300
Anaheim, 1 at 10		
3 hours - follow up reports	13	
Overnight		\$200

Real Property

## 1. Regular Items

Receive about 100 bills and report on 20.

70 at 2 hours	
15 at 3 hours	
15 at 10 hours	335

Receive about 75 proposed changes and revisions to administrative regulations. Staff does initial screening.

75 at 2 hours	150
---------------	-----

Receive about 10 conference resolutions

8 at 2 hours  
2 at 5 hours 26

Monthly roundtable luncheon 40 \$240

## 2. Special Items

a. Revision of lis pendens law office 30

b. Substantial Impairment (time reported at Condemnation Committee)

c. Revision of AB 3531 (creative financing disclosures law)

Office 40  
Sacramento 30 \$225

## 3. Meetings

2 in L.A.; 2 in S.F.; 2 out of the area overnight; follow up reports 120 \$700

### Taxation

## 1. Regular Items

Receives about 200 bills per year and reports on about 20

180 at 1/4 hour  
10 at 1 hour  
10 at 2 hours 65

Review tax literature 40

Meeting with District Directors of IRS 20

Resolutions of the Conference

5 at 1 hour each 5

## 2. Special Items

a. Review of changes in California Tax Law, edit annual report 40

b. Section Recruitment Publications of State Bar - revisions 20

c. Rev. & T. 24514(a)(3) repeal on State Bar tentative legislative program

Office 20  
Sacramento 40 \$150

d. Proposal to limit tax deduction in state income tax 20

## 3. Meetings

2 in S.F.; 2 in L.A.; 2 out of area overnight; follow up reports 120 \$700

### SPECIAL NOTE RE: Business Law Section

While this group has no assigned staff attorney, there are still phone calls, questions and expenditure co-signatures that are directed to an attorney on staff; that's me.

Estimated time 25



## BUSINESS LAW SECTION

ITEM: Section Administrator  
COST: Confidential  
OBJECTIVE: Manage the operation of the Section in its compliance with its responsibilities to the Board of Governors.  
METHODOLOGY: Section Administrator, 45% of time and secretary, 44% time.

Duties include preparation and followup for Executive Committee meetings, attendance at meetings and preparation of minutes. Serving as liaison between the State Bar and the Section's Executive and standing committees. Communicating with Section Officers and committee members re Section policies and operations. Handling telephone inquiries re Section activities, policies and relevant legislation. Analyzing and referring inquiries to the appropriate Section personnel. Preparing reports to State Bar management, Financial Department, etc. re Section activities, finances and operations.

Coordinating the Section's annual spring program. Coordinating the Section's annual program and activities in conjunction with the State Bar annual meeting. Coordinating the printing and publication of Section publications. Overseeing the financial operation of the Section and preparing an annual budget. Consulting with the Section Executive Committee re recruitment and coordinating Section enrollment. Interviewing, hiring, training, evaluating and supervising secretarial staff.

---

## CRIMINAL LAW SECTION

ITEM: Staff attorney assistance  
COST: Confidential  
OBJECTIVE: Provide requisite staff attorney assistance to the Section in its compliance with its responsibilities to the Board of Governors.  
METHODOLOGY: Staff attorney, 48% time; and secretary, 19% time.

Duties include preparation and follow-up for Executive Committee meetings, attendance at meetings and preparation of minutes. Coordination of, and preparation for legislative committee meetings including legislative analysis, preparation of reports on bills of others, liaison between Section and State Bar Board of Governors. Preparation of special reports to the Board of Governors on topics related to criminal law. Liaison between Board of Governors and Section regarding the appointments procedures. Provide responses to public inquiries relating to criminal law. Liaison to ABA Criminal Justice Section.

---

### CRIMINAL LAW SECTION

ITEM: Section Administrator support

COST: Confidential

OBJECTIVE: Manage the operations of the Section in compliance with its responsibilities to the Board of Governors.

METHODOLOGY: Section Administration 31%; secretary 20%.

#### Duties Include:

#### I. *Management and Development of Section Activities and Projects.*

A. Working directly with Section Chair and Committee members in providing management and development of Section activities and programs.

B. Preparation of agendas, attendance at, writing and distribution of minutes and administrative reports relative to meetings of the Executive Committee.

C. Coordination of production and mailing for pamphlets, information materials, Section rosters, and promotional materials for membership. Duties also include developing appropriate procedures for section enrollments, including management of membership processing and special mailings.

D. Coordinating educational offerings with the C.E.B. Liaison to the Section.

E. Secretarial interviewing, hiring, training and performance evaluation.

F. Answering inquiries from attorneys and the public, directing to the appropriate source as necessary and generally serving as a liaison between the public and the State Bar of California.

G. Working in the coordination of Section activities with various departments within the State bar, e.g., Legal Specialization, Finance and Operations, Communications, Office Services, Computer Services, Membership Records and Word Processing.

#### II. *Seminars, Workshops and the Annual Program.*

A. Attending and managing the annual program, including registration, publicity, taping, media, location, syllabi, speakers and other management tasks relating to the successful production of the Section's Annual Program.

#### III. *Newsletters*

A. Managing production (proofing galleys and approving layout), final editing and mailing. Writing promotional and informational articles as required.

#### IV. *Budgets*

A. Preparing annual budget, monthly budget statements, processing all bills and expense vouchers and maintaining accurate financial records.

- ITEM: Staff Attorney Assistance to the Estate Planning, Trust and Probate Law Section
- COST: To be revealed to the Board of Governors.
- OBJECTIVE: Provide attorney assistance to the Section.
- METHODOLOGY: Staff attorney, 23% time; attorney's secretary, 20% time.

*Staff assistance includes:* Advising Section of State Bar rules, regulations and procedures writing legislative and other Section reports to the Board of Governors; tracking status of bills of interest to the Section; making legislative reports on legislative bills of others; drafting Section response to Conference Resolutions; taking and transcribing Executive Committee minutes.

*Staff attorney:* attends all Executive Committee meetings (average of nine per year, at nine hours each including travel time) because of the Section's strong involvement in the State Bar's legislative program and work with the California Law Revision Commission; advises the Section of State Bar rules, regulations and policies pertinent to Executive Committee's monthly agenda items. Estimated staff attorney time for this Section is five days per month.

# ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

- ITEM: Section Administrator support
- COST: Confidential

OBJECTIVE: Manage the operations of the Section in compliance with its responsibilities to the Board of Governors.

METHODOLOGY: Section Administration 34%; secretary 39%.

## Duties Include:

### I. *Management and Development of Section Activities and Projects.*

A. Working directly with Section Chair and Committee members in providing management and development of Section activities and programs.

B. Preparation of agendas, attendance at, writing and distribution of minutes and administrative reports relative to meetings of the Executive Committee.

C. Coordination of production and mailing for pamphlets, information materials, Section rosters, and promotional materials for membership. Duties also include developing appropriate procedures for section enrollments, including management of membership processing and special mailings.

D. Coordinating educational offerings with the C.E.B. Liaison to the Section.



E. Secretarial interviewing, hiring, training and performance evaluation.

F. Answering inquiries from attorneys and the public, directing to the appropriate source as necessary and generally serving as a liaison between the public and the State Bar of California.

G. Working in the coordination of Section activities with various departments within the State bar, e.g., Legal Specialization, Finance and Operations, Communications, Office Services, Computer Services, Membership Records and Word Processing.

## II. *Seminars, Workshops and the Annual Program.*

A. Attending and managing the annual program, including registration, publicity, taping, media, location, syllabi, speakers and other management tasks relating to the successful production of the Section's Annual Program.

## III. *Newsletters*

A. Managing production (proofing galleys and approving layout), final editing and mailing. Writing promotional and informational articles as required.

## IV. *Budgets*

A. Preparing annual budget, monthly budget statements, processing all bills and expense vouchers and maintaining accurate financial records.

## FAMILY LAW SECTION

ITEM: Staff attorney assistance to the Family Law Section

COST: To be disclosed to the Board of Governors

OBJECTIVE: Provide staff attorney assistance to the Section

METHODOLOGY: Staff attorney, 23% time; secretary, 10% time.

ASSISTANCE INCLUDES: Advising the Section of State Bar rules, regulations and procedures; writing legislative and other reports to the Board of Governors; writing the Section's response to Conference Resolutions; reviewing minutes drafted by the Section Administrator and writing the portions dealing with legislation; tracking bills of interest to the Section.

The staff attorney attends all Executive Committee meetings (average of 11 per year for eight hours each, including travel time) because a high number of bills dealing with family law are referred to the Section, and to advise the Section of State Bar rules, regulations and procedures pertaining to agenda items. Estimated attorney time for this Section is five days per month. Most of the secretarial assistance to the Section is provided by the Section Administrator's secretary.

### FAMILY LAW SECTION

ITEM: Section Administrator support

COST: Confidential

OBJECTIVE: Manage the operations of the Section in compliance with its responsibilities to the Board of Governors.

METHODOLOGY: Section Administration 39%; secretary 42%.

#### Duties Include:

##### I. *Management and Development of Section Activities and Projects.*

A. Working directly with Section Chair and Committee members in providing management and development of Section activities and programs.

B. Preparation of agendas, attendance at, writing and distribution of minutes and administrative reports relative to meetings of the Executive Committee.

C. Coordination of production and mailing for pamphlets, informational materials, Section rosters, and promotional materials for membership. Duties also include developing appropriate procedures for section enrollments, including management of membership processing and special mailings.

D. Coordinating educational offerings with the C.E.B. Liaison to the Section.

E. Secretarial interviewing, hiring, training and performance evaluation.

F. Answering inquiries from attorneys and the public, directing to the appropriate source as necessary and generally serving as a liaison between the public and the State Bar of California.

G. Working in the coordination of Section activities with various departments within the State bar, e.g., Legal Specialization, Finance and Operations, Communications, Office Services, Computer Services, Membership Records and Word Processing.

##### II. *Seminars, Workshops and the Annual Program.*

A. Attending and managing the annual program, including registration, publicity, taping, media, location, syllabi, speakers and other management tasks relating to the successful production of the Section's Annual Program.

##### III. *Newsletters*

A. Managing production (proofing galleys and approving layout), final editing and mailing. Writing promotional and informational articles as required.

##### IV. *Budgets*

A. Preparing annual budget, monthly budget statements, processing all bills and expense vouchers and maintaining accurate financial records.

## LABOR AND EMPLOYMENT LAW SECTION

ITEM: Section Administrator  
COST: Confidential  
OBJECTIVE: Manage the operation of the Section in its compliance with its responsibilities to the Board of Governors.  
METHODOLOGY: Section Administrator, 37% time and secretary, 38% time.

Duties include: Preparation and followup for Executive Committee meetings, attendance at meetings and preparation of minutes. Direction of the Section's recruitment campaign. Serving as liaison between the State Bar and the Section. Answering inquiries from the public and where indicated, referring them to the appropriate Section representatives. Preparing financial reports and reports re Section operations and activities. Coordinating Section programs. Coordinating the Section's annual program and activities held in conjunction with the State Bar annual meeting. Overseeing the financial operation, approving expenditures, and preparing the annual budget of the Section. Overseeing the enrollment of Section members. Coordinating the design/printing/distribution of Section publications. Overseeing the production of the Section newsletter including its editing, proofing, layout and printing. Interviewing, hiring, training, evaluating and supervising secretarial staff.

## PATENT, TRADEMARK AND COPYRIGHT LAW SECTION

ITEM: Staff attorney assistance  
COST: To be disclosed to the Board of Governors  
OBJECTIVE: Provide attorney assistance to the Section.  
METHODOLOGY: Staff attorney, minimal time (less than 3%); secretary, minimal time (less than 2%)  
 Assistance includes: drafting legislative reports to Board of Governors (1981 affirmative proposal to conform California copyright laws to the 1976 Federal Copyright Act); editing Conference Resolution reports; providing advice and assistance as needed.  
 Staff attorney only attends Executive Committee meetings held in San Francisco and where a legislative matter is on the agenda. Estimated attorney time for this Section is roughly half a day a month.

## PATENT LAW SECTION

ITEM: Section Administrator  
COST: Confidential  
OBJECTIVE: Manage the operation of the Section in its compliance with its responsibilities to the Board of Governors.  
METHODOLOGY: Section Administrator, 18% time and secretary, 18% time.



Duties include: Preparation and followup for Executive Committee meetings, attendance at meetings and preparation of minutes. Serving as liaison between the State Bar and the Section's executive and standing committees. Communicating with Section Officers and committee members re Section policies and operations. Providing information to the public re Section activities, policies and relevant legislation. Analyzing and referring inquiries from the public to the appropriate Section personnel. Coordinating the Section's programs. Coordinating Section activities held in conjunction with the State Bar's annual meeting. Overseeing the financial operation, approving expenditures, and preparing the annual budget of the section. Overseeing the enrollment of Section members. Managing the Section's recruitment campaign. Coordinating the design, printing and distribution of Section publications. Coordinating production/distribution of the Section newsletter. Interviewing, hiring, training, evaluating and supervising secretarial staff.

---

#### ATTACHMENT J

Other bar services projects under way include responding to information requests from bar leaders on a myriad of subjects; publication of the state bar *Directory*, a loose-leaf binder listing persons active in the California bar scene; a bar inventory or survey of voluntary bar association programs, operations, structure and needs to be published in a booklet that distills responses into a readable, useful format; a series of one-day meetings on issues of interest and importance to bar leaders such as

lawyer discipline, unauthorized practice of law and public education; and a conference on the particular concerns of minority bar leaders.

Bar services also sponsors a program for bar leaders at the Conference of Bar Presidents; last year's half-day session focused presidents and executives on how to speak effectively and how to deal effectively with the news media. Staff also works with the newly-formed Executives of California Lawyers' Associations to bring programs on better bar management to the state's bar executives.

#### *\*Information services for members*

This state bar unit receives and answers over 400 specific questions per month, written or phoned in by members of the legal profession and by the general public as well.

#### *\*Conference of Bar Presidents*

Planned and chaired by the Executive Committee of the Conference of Delegates, the annual conference of Bar Presidents is a vehicle for an exchange between the state bar and local bar presidents about state bar activities and programs. It also is an opportunity for bar leaders to discuss with each other common issues and concerns and to explore various alternatives for performing local bar services. In addition, the conference allows local bar association officers to bring to the state bar Board of Governors the views of members in their local groups.

### *\*Conference of Delegates*

The conference is the only opportunity for local bar associations to propose, analyze, debate and adopt resolutions dealing with a wide range of issues, including the regulation of the legal profession, the role and activities of the state bar and the bar Board of Governors and, mostly, legislative proposals primarily concerned with the administration of justice, the practice of law and the delivery of legal services.

The conference in 1979 was empowered by the bar Board of Governors to develop and carry its own legislative program for the first time in its history. Under this new system, conference resolutions that are not placed by the Board of Governors in the state bar's legislative program are categorized for further action, with Category I proposals then pursued in Sacramento by the state bar's legislative advocate. Proposals placed in Category II through IV are advocated by the local bar association sponsoring the original conference resolution or are referred for further study to appropriate state bar sections or committees. Resolutions not dealing with legislation for the most part are advisory only to the Board of Governors.

### ATTACHMENT K

#### RESOLUTIONS TO BE PRESENTED TO THE 1982 CONFERENCE OF DELEGATES

#### INDEX BY SUBJECT

##### PROBATE AND ESTATE PLANNING

*Resolution: 1-1; Subject: Wills: Admissibility Where Lacking Formal Execution; Code: Probate Code § 58.*

*Resolution: 1-2; Subject: Community Property Set-Aside Petition: Service of Copy; Code: Probate Code § 653.*

*Resolution: 1-3; Subject: Will Contest: Compensation for Successful Defense; Code: Probate Code § 902.*

*Resolution: 1-4; Subject: Grantor Trusts: Protection Against Termination by Merger; Code: Civil Code § 2225.*

*Resolution: 1-5; Subject: Probate Sales: Apportionment of Commission Among Real Estate Brokers; Code: Probate Code § 761.*

*Resolution: 1-6; Subject: Inheritance and Gift Tax: Disclaimer to Preserve Charitable Exemption; Code: Probate Code § 190.*

*Resolution: 1-7; Subject: Inheritance Tax: Marital Deduction for Qualified Terminable Interest Property; Code: Revenue & Taxation Code § 13805.1.*

*Resolution: 1-8; Subject: Inheritance Tax: Exemption of Inter Vivos Transfers that Take Effect at Death; Code: Revenue & Taxation Code § 13643.*

*Resolution: 1-9; Subject: Inheritance Tax: Designation of Person to Receive Property Tax-Free; Code: Revenue & Taxation Code §§ 13307 & 13805.*

## MISCELLANEOUS

*Resolution: 2-1; Subject: Draft Registration: Repeal of Presidential Proclamation; Code:.*

*Resolution: 2-2; Subject: Bilateral Nuclear Weapons Freeze Initiative; Code:.*

*Resolution: 2-3; Subject: Immigration: Opposition to Legislative Changes; Code:.*

*Resolution: 2-4; Subject: Sex Discrimination: State Equal Rights Amendment; Code: California Constitution, Article I, § 30.*

*Resolution: 2-5; Subject: Federal Courts: Limiting Jurisdiction Over Certain Issues; Code:.*

*Resolution: 2-6; Subject: Income Tax: Denial of Deduction to Patron of Discriminatory Private Club Holding an Alcoholic Beverage License; Code: Business & Professions Code § 23438; Revenue & Taxation Code §§ 17202.2 & 24343.2.*

*Resolution: 2-7; Subject: Federal Budget: Transfer of Funds From Military Budget to Meet Specified Social Needs; Code:.*

*Resolution: 2-8; Subject: California Environmental Quality Act: Notice of Determination for Exempt Project; Code: Public Resources Code §§ 21108 & 21152.*

*Resolution: 2-9; Subject: National Holidays: Dr. Martin Luther King, Jr.'s Birthday; Code:.*

*Resolution: 2-10; Subject: Education of Handicapped Children: Use of Attorneys for Fair Hearings; Code: Education Code § 56507.*

*Resolution: 2-11; Subject: Reapportionment: Establishment of a Districting Commission; Code: California Constitution, article IV, §§ 1 & 6; article IV A; article VI, § 17, article XXI.*

*Resolution: 2-12; Subject: Attorneys' Fees: County Contribution to Fees Incurred to Collect Supplemental Security Income Benefits; Code: Welfare & Institutions Code § 17403.1.*

## CIVIL PROCEDURE AND EVIDENCE

*Resolution: 3-1; Subject: Depositions Oath or Verification; Code: Code of Civil Procedure § 2015.5.*

*Resolution: 3-2; Subject: Depositions: Notice Requirements and Transcripts; Code: Code of Civil Procedure § 2019.*

*Resolution: 3-3; Subject: Depositions: Time for Notice of Deposition When Documents Requested; Code: Code of Civil Procedure § 2019.*

*Resolution: 3-4; Subject: Interrogatories and Requests for Admissions: Time for Further Discovery; Code: Code of Civil Procedure §§ 2030 & 2033.*

*Resolution: 3-5; Subject: Expert Witnesses: Mandatory Disclosure; Code: Code of Civil Procedure §§ 2037 & 2037.9.*

*Resolution: 3-6; Subject: Expert Witnesses: Exchange of Lists and Fees for "Bad Faith" Disclosure; Code: Code of Civil Procedure §§ 2037 & 2037.1.*

*Resolution: 3-7; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.10.*



*Resolution: 3-8; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.20.*

*Resolution: 3-9; Subject: Demurrers: Abolition; Subject: Code of Civil Procedure § 430.30.*

*Resolution: 3-10; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.40.*

*Resolution: 3-11; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.50.*

*Resolution: 3-12; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.60.*

*Resolution: 3-13; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.70.*

*Resolution: 3-14; Subject: Demurrers: Abolition; Code: Code of Civil Procedure § 430.80.*

*Resolution: 3-15; Subject: Mandatory Arbitration: Request for Trial De Novo When There Are Multiple Parties; Code: Code of Civil Procedure §§ 1141.20 & 1141.23.*

*Resolution: 3-16; Subject: Mandatory Arbitration: Award of Attorneys' Fees After Trial de Novo; Code: Code of Civil Procedure § 1141.21.*

*Resolution: 3-17; Subject: Mandatory Arbitration: Award of Attorneys' Fees After Trial De Novo; Code: Code of Civil Procedure § 1141.21.*

*Resolution: 3-18; Subject: Mandatory Arbitration: Increased Compensation for Arbitrators; Code: Code of Civil Procedure § 1141.18.*

*Resolution: 3-19; Subject: Mandatory Arbitration: Sanctions for Failure to Participate in Good Faith; Code: Code of Civil Procedure § 1141.19a.*

*Resolution: 3-20; Subject: Uninsured Motorist Arbitration Hearings: Subpoenas; Code: Insurance Code § 11580.2.*

*Resolution: 3-21; Subject: Appeals: Superior Court Attachment Order; Code: Code of Civil Procedure § 904.1.*

*Resolution: 3-22; Subject: Appeals: Municipal Court Attachment Orders; Code: Code of Civil Procedure § 904.2.*

*Resolution: 3-23; Subject: Law and Motion: Tentative Ruling Procedure; Code: Code of Civil Procedure § 1006.5.*

*Resolution: 3-24; Subject: Pretrial Conferences Motions to Set; Code: California Rules of Court, Rules 206 & 208.*

*Resolution: 3-25; Subject: Statement of Decision: Time for Requesting; Code: Code of Civil Procedure § 632.*

*Resolution: 3-26; Subject: Judicial Council Forms: Deletion of Mandatory Use Requirement; Code: Code of Civil Procedure § 425.12.*

*Resolution: 3-27; Subject: Civil Procedure: Sanctions for Pleading in Bad Faith; Code: Code of Civil Procedure § 128.5.*

*Resolution: 3-28; Subject: Real Property: Proof on Motion to Expunge Lis Pendens; Code: Code of Civil Procedure § 409.1.*

*Resolution: 3-29; Subject: Real Property: Consent to Withdrawal of a Lis Pendens; Code: Code of Civil Procedure § 409.55.*

*Resolution: 3-30; Subject: Medical Malpractice: Notice Regarding Intention to Bring Action; Code: Code of Civil Procedure § 364.*

*Resolution: 3-31; Subject: Medical Malpractice: Discipline of Attorneys for Failure to Comply With Notice Requirement; Code: Code of Civil Procedure § 365.*

*Resolution: 3-32; Subject: Medical Malpractice: Requirement for Certificate of Merit; Code: Code of Civil Procedure § 411.30.*

*Resolution: 3-33; Subject: Real Property: Remedies for Breach of Agreement; Code: Civil Code §§ 3306, 3307, & 3387.*

*Resolution: 3-34; Subject: Mechanic's Lien Release Bond: Notice and Statute of Limitations; Code: Civil Code § 3144.5.*

*Resolution: 3-35; Subject: Perjury: Civil Cause of Action; Code: Civil Code §§ 3345-3345.4.*

*Resolution: 3-36; Subject: Bifurcated Trials: Mandatory Dismissal; Code: Code of Civil Procedure § 583.*

*Resolution: 3-37; Subject: Trademarks: Seizure of Infringing Goods; Code: Business & Professions Code § 14340.*

*Resolution: 3-38; Subject: Attorneys: Attire in the Courtroom; Code: California Rules of Court, rule 987.*

*Resolution: 3-39; Subject: Municipal/Justice Courts: Appearance of Corporate Defendants; Code: Code of Civil Procedure § 87.*

## BUSINESS, CORPORATE AND TAX PRACTICE

*Resolution: 4-1; Subject: State Income Tax: Adoption of New Tax Year for Subsidiary Corporation; Code: Revenue & Taxation Code § 24638.*

*Resolution: 4-2; Subject: State Tax Liens: Exemption of Security Interests; Code: Government Code § 7170.*

*Resolution: 4-3; Subject: Corporations Determination of Valuation Date for Purchase of Stock to Avoid Dissolution; Code: Corporations Code § 2000.*

*Resolution: 4-4; Subject: Vehicle Dealer's License: \$50,000 Bond; Code: Vehicle Code §§ 11710 & 11710.1.*

*Resolution: 4-5; Subject: Invention Development Business: Confidential Disclosures; Code: Business & Professions Code § 22395.*

*Resolution: 4-6; Subject: Invention Development Business: Warning To Customer; Code: Business & Professions Code § 22381.*

*Resolution: 4-7; Subject: Banks: Restriction on Deposit of State Funds; Code: Government Code § 16500.*

*Resolution: 4-8; Subject: Bankruptcy: Orders For Relief From Stay; Code: 11 United States Code § 362.*

*Resolution: 4-9; Subject: Trade Name: Right to Use; Code: Corporations Code § 201.*

*Resolution: 4-10; Subject: State Income Tax: Carry-over or Carry-back of Business Operating Losses; Code: Revenue & Taxation Code § 17221.5.*

*Resolution: 4-11; Subject: Dependent Care: Increases in Net Tax Credit for Employment Related Expenses; Code: Revenue & Taxation Code § 17052.6.*

*Resolution: 4-12; Subject: Rate of Interest: Judgments; Code: California Constitution, article XV, § 1.*

*Resolution: 4-13; Subject: Rate of Interest: Prejudgment and Postjudgment; Code: California Constitution, article XV, § 1.*

*Resolution: 4-14; Subject: Interest Rates: Breach of Contracts; Code: Civil Code § 3289.*

*Resolution: 4-15; Subject: Tort Actions: Prejudgment Interest; Code: Civil Code § 3287.*

*Resolution: 4-16; Subject: Tort Actions: Prejudgment Interest; Code: Civil Code § 3287.*

#### STATE BAR AND LEGAL PRACTICE

*Resolution: 5-1; Subject: Biotechnology and Genetic Engineering: Establishes a Standing Committee; Code:.*

*Resolution: 5-2; Subject: Continuing Education: Creates a Committee to Study CEB; Code:.*

*Resolution: 5-3; Subject: State Bar Board of Governors Public Attorney Members; Code: Business & Professions Code §§ 6013.6 & 6013.7.*

*Resolution: 5-4; Subject: State Bar Board of Governors: Limits on Voting Rights of Public Members; Code: Business & Professions Code §§ 6008.4, 6030 & 6031.*

*Resolution: 5-5; Subject: Conference of Delegates: State Bar Assistance in Drafting Resolutions; Code:.*

*Resolution: 5-6; Subject: State Bar Functions: Coordination of Small Bar Association Activities; Code:.*

*Resolution: 5-7; Subject: Legal Services Corporation Programs: Withdrawal of Counsel; Code: Code of Civil Procedure § 285.2.*

*Resolution: 5-8; Subject: Attorney's Fees: Written Agreement Required; Code: Business & Professions Code § 6250.*

*Resolution: 5-9; Subject: Acknowledgement of Instruments: Notarization by Attorneys; Code: Civil Code § 1180.*

*Resolution: 5-10; Subject: Lawyer Referral Services: Time Limits on Disclosure of Discipline of Member; Code: Civil Code § 43.95.*

*Resolution: 5-11; Subject: Client Trust Accounts: Feasibility Study of Voluntary Audit Program; Code:.*

*Resolution: 5-12; Subject: Client Trust Accounts: Establishment of Specific Guidelines for Maintaining; Code:.*

*Resolution: 5-13; Subject: Legal Education: Study of Required Internship Program; Code:.*

*Resolution: 5-14; Subject: Law Students: Prosecution of Infractions Without Direct Supervision; Code: Rules Governing the Practical Training of Law Students, rule VI.*

*Resolution: 5-15; Subject: Law School Accreditation: Discrimination; Code: Rules Regulating Admission to Practice Law in California, rule XVIII, §§ 182 & 183.*



*Resolution: 5-16; Subject: Unaccredited Law Schools: Disclosure of Bar Examination Success Rate; Code: Business & Professions Code § 6060.10.*

*Resolution: 5-17; Subject: Attorney's Fees: Disciplinary Referral for Consistent Pattern of Unusually High Fees; Code: Business & Professions Code § 6207.*

*Resolution: 5-18; Subject: Admission to Practice: Time Limits in Moral Character Hearings; Code: Rules Regulating Admission to Practice Law in California, rule X, § 105.*

*Resolution: 5-19; Subject: Attorney Discipline: Law Offices Management Study as a Condition of Probation; Code:.*

*Resolution: 5-20; Subject: Attorney Discipline: Reimbursement of the Cost of Disciplinary Proceedings; Code: Business & Professions Code § 6077.*

#### CRIMINAL LAW AND PROCEDURE

*Resolution: 6-1; Subject: Concealable Firearms: Registration; Code: Penal Code §§ 12026, 12026.5, 12026.6, 12070, 12072, & 12080.*

*Resolution: 6-2; Subject: Concealable Firearms: Certificate of Training; Code: Penal Code §§ 12072 & 12077.5.*

*Resolution: 6-3; Subject: Criminal Pleadings: Demurrers to Sentence Enhancement Allegations; Code: Penal Code § 1004.*

*Resolution: 6-4; Subject: Criminal Pleadings: Motion to ismiss a Sentence Enhancement Allegation; Code: Penal Code § 995.*

*Resolution: 6-5; Subject: Prostitution: Decriminalization; Code: Penal Code §§ 266, 266b, 266d, 266e, 266f, 266g, 266i, 268, 269, 315, 316, 318, 647, 784, 1108 & 11225.*

*Resolution: 6-6; Subject: Habeas Corpus: Compensation of Counsel; Code: Penal Code § 1474.*

*Resolution: 6-7; Subject: Public Assistance: Punishment for Fraud; Code: Welfare & Institutions Code § 11483.*

*Resolution: 6-8; Subject: Unlawful Assembly: Exemption of News Media From an Order to Disperse; Code: Penal Code § 409.*

*Resolution: 6-9; Subject: Criminal Pleadings: Motion for Acquittal of Sentence Enhancement; Code: Penal Code §§ 1118 & 1118.1.*

*Resolution: 6-10; Subject: Criminal Appeals: Necessity of Argument; Code: Penal Code § 1253.*

#### LABOR LAW

*Resolution: 7-1; Subject: Employment Contracts Termination At Will; Code: Labor Code § 2922.*

*Resolution: 7-2; Subject: Sexual Harassment: Unlawful Employment Practice; Code: Government Code § 12949.*

*Resolution: 7-3; Subject: Job Discrimination: Equal Pay for Comparable Work; Code:.*

*Resolution: 7-4; Subject: Employment: Encouraging Flexible Work Schedules; Code:.*

*Resolution: 7-5; Subject: Jury Duty: Payment from Workers' Compensation Insurance; Code: California Constitution, article 14, § 4.*

*Resolution: 7-6; Subject: Employment Contracts: Assignment of Employee Creations; Code: Labor Code § 2870.*

*Resolution: 7-7; Subject: Worker's Compensation: Increase in Temporary and Permanent Disability Benefits; Code: Labor Code § 4453.*

*Resolution: 7-8; Subject: Workers' Compensation: Increase in Temporary Disability Benefits for Household Employees and Newspaper Vendors; Code: Labor Code § 4453.1.*

*Resolution: 7-9; Subject: Workers' Compensation: Increase in Permanent Disability Benefits to Minors; Code: Labor Code § 4453.*

*Resolution: 7-10; Subject: Workers' Compensation: Increase in Temporary and Permanent Disability Benefits; Code: Labor Code § 4460.*

*Resolution: 7-11; Subject: Workers' Compensation: Increase in Temporary Total Disability Benefits; Code: Labor Code § 4453.*

*Resolution: 7-12; Subject: Workers' Compensation: Increase in Temporary Partial Disability Payments; Code: Labor Code § 4654.*

*Resolution: 7-13; Subject: Unemployment: Amendments to Humphrey-Hawkins Act; Code: 15 United States Code §§ 1021, 1022f & 1023.*

## FAMILY LAW

*Resolution: 8-1; Subject: Dissolution of Marriage: Reimbursement for Separate Contribution to Community Property; Code: Civil Code § 4800.7.*

*Resolution: 8-2; Subject: Dissolution of Marriage: Collection of Tort Damages; Code: Civil Code § 5122.*

*Resolution: 8-3; Subject: Spousal Support: Cohabitation of Supported Spouse; Code: Civil Code § 4801.5.*

*Resolution: 8-4; Subject: Spousal Support: Cohabitation of Supported Spouse; Code: Civil Code § 4801.5.*

*Resolution: 8-5; Subject: Spousal Support: Cohabitation of Supporting Spouse; Code: Civil Code § 4801.5.*

*Resolution: 8-6; Subject: Dissolution of Marriage: Military Pension as Community Property; Code:.*

*Resolution: 8-7; Subject: Dissolution of Marriage: Group Health Insurance for Non-Employee Spouse; Code: Civil Code § 4365.*

*Resolution: 8-8; Subject: Child Support: Enforcement Actions to Include Custody; Code: Welfare & Institutions Code § 11350.1.*

*Resolution: 8-9; Subject: Paternity: Admissibility of Refusal to Submit to Blood Tests; Code: Evidence Code § 892.*

*Resolution: 8-10; Subject: Child Abduction: Prosecution of Parent Who Violates Physical Custody Decree; Code: Penal Code § 278.5.*

*Resolution: 8-11; Subject: Child Care Centers: Mandatory Establishment in Schools; Code: Education Code §§ 8255 & 8265.*

*Resolution: 8-12; Subject: Bankruptcy: Discharge of Family Law Attorneys' Fees and Costs; Code: 11 United States Code § 523.*

#### LATE FILED RESOLUTIONS

*Resolution: LF-1; Subject: Gun Control: Endorsement of California Initiative; Code:.*

---

COD = Conference of Delegates

EX Com = Executive Committee, Conference of Delegates

BOG = Board of Governors

---

#### STATUS OF 1980 AND 1981 CONFERENCE RESOLUTIONS

\* \* \*

#### 1981 RESOLUTIONS

*Resolution: 1-1-81; Title: Attorneys' Fees; Written Fee Agreements Required; Status: COD: Disapproved.*

*Resolution: 1-2-81; Title: Attorneys; Law Students; Training and Examination on Management Techniques; Status: COD: Disapproved.*

*Resolution: 1-3-81; Title: Law Schools; University of California; Part-time Degree Programs; Status: COD: Approved; BOG: Approved 2/5/82.*

*Resolution: 1-4-81; Title: Privilege of Confidentiality; Grievance Proceedings Conducted by Local Bar Associations; Status: COD: Approved as Amended; Category III, referred to Palo Alto Area Bar Association.*

*Resolution: 1-5-81; Title: Nonpayment of State Bar Dues; Retroactive Reinstatement Where No Knowledge of Suspension; Status: COD: Approved; Category II, not introduced.*

*Resolution: 1-6-81; Title: State Bar Court; Establish Oversight Committee; Status: COD: Disapproved.*

*Resolution: 1-7-81; Title: State Bar Disciplinary Procedures; Examination as an Adverse Witness; Status: COD: Approved; BOG: Referred to Committee on Adjudication and Discipline 2/5/82.*

*Resolution: 1-8-81; Title: Attorneys; Advertising; Use of Generic Names; Status: COD: Disapproved.*

*Resolution: 1-9-81; Title: Pro Bono Legal Services; Exemption from Malpractice Liability; Status: COD: Disapproved.*

*Resolution: 1-10-81; Title: Lawyer Referral Services; Disclosure of Discipline of Member; Status: COD: Approved; Category III, referred to Beverly Hills Bar Association.*

*Resolution: 1-11-81; Title: Conference of Delegates; Unilateral Withdrawal of Conference Resolutions; Status: COD: Approved as Amended; BOG: Disapproved 4/2/82.*



*Resolution: 2-1-81; Title: Nuclear Power Plant Licensing; Cost Analysis Required; Status: COD: Disapproved.*

*Resolution: 2-2-81; Title: Federal War Powers Act; Consultation with Congress Prior to Use of Nuclear Arms; Status: COD: Disapproved.*

*Resolution: 2-3-81; Title: U.S. Presidency; Limit to Single Six-year Term; Status: COD: Disapproved.*

*Resolution: 2-4-81; Title: Lieutenant Governor; Limitations on Power; Status: COD: Approved; Category III, referred to Beverly Hills Bar Association.*

*Resolution: 2-5-81; Title: Olympic and Pan American Games; Participation of United States' Athletes; Status: COD: Disapproved.*

*Resolution: 2-6-81; Title: Federal Budget; Transfer of Funds for Use in Cities to Meet Specified Needs and for the Maintenance of Social Security; Status: COD: Disapproved.*

*Resolution: 2-7-81; Title: Judicial Salaries; Removal of Five Percent Limit on Increases; Status: COD: Action Unnecessary.*

*Resolution: 2-8-81; Title: Judges; Teaching at public Law Schools; Status: COD: Approved, Category I, ACA 78 (Berman) held at request of author.*

*Resolution: 2-9-81; Title: Judges; Election; Candidate's Statement; \$1,000 Maximum Cost; Status: COD: Approved; Category III, referred to Beverly Hills Bar Association.*

*Resolution: 2-10-81; Title: Minimum Automobile Insurance Requirements; Status: COD: Approved; Category II, not introduced.*

*Resolution: 3-1-81; Title: Withdrawal of Lis Pendens; Deletes Requirement of Dismissal of Underlying Cause of Action; Status: COD: Approved; Category II, AB 3618 (Kapiloff) passed by Senate Judiciary Committee 6/15/82.*

*Resolution: 3-2-81; Title: Lis Pendens; Attorneys' Fees on Motion To Expunge; Status: COD: Disapproved.*

*Resolution: 3-3-81; Title: Unlawful Detainer; Damages on Lease Forfeiture; Status: COD: Approved; Category II, AB 3552 (Robinson) passed by Senate Judiciary Committee 6/22/82.*

*Resolution: 3-4-81; Title: Leased Premises; Tenant's Right to Repair or Vacate; Status: COD: Disapproved.*

*Resolution: 3-5-81; Title: Mobile Homes; Disposition After Termination of Tenancy; Status: COD: Referred to Executive Committee.*

*Resolution: 3-6-81; Title: Rent Control; Status: COD: Disapproved.*

*Resolution: 3-7-81; Title: Homestead Exemption; Increase in Value; Status: COD: Approved; Category I, AB 707 (McAlister) passed by Senate Judiciary Committee 6/22/82.*

*Resolution: 3-8-81; Title: Real Property; Money Damages in Lieu of Specific Performance; Status: COD: Withdrawn.*

*Resolution: 3-9-81; Title: Mechanic's Liens; Repeal of Constitutional Provision; Status: COD: Disapproved.*

*Resolution: 3-10-81; Title: Subdivisions; Condominiums; Documents To Be Provided Purchaser; Status: COD: Referred To Executive Committee.*

*Resolution: 3-11-81; Title: Subdivision Map Act; Offers for Sale Permitted Before Filing of Final Map; Status: COD: Approved; Chapter 87, Statutes of 1982.*

*Resolution: 3-12-81; Title: Deficiency Judgments after Exercise of Power of Sale in Deed of Trust or Mortgage; Qualified or Exempt Securities; Status: COD: Approved as Amended; Category IV, Referred to Business Law and Real Property Law Sections.*

*Resolution: 4-1-81; Title: Rate of Interest; Contracts; Status: COD: Disapproved.*

*Resolution: 4-2-81; Title: Workers' Compensation; Coverage of Jury Duty; Status: COD: Disapproved.*

*Resolution: 4-3-81; Title: Banking; State of California Deposits; Status: COD: Disapproved.*

*Resolution: 4-4-81; Title: Restaurants; Statement of Caloric Content on Menu; Status: COD: Disapproved.*

*Resolution: 4-5-81; Title: Liquor License Transfers; Claims by Judgment Creditors; Status: COD: Approved as Amended; Category III, referred to Orange County Bar Association.*

*Resolution: 4-6-81; Title: Income Tax; Net Operating Loss Carryback and Carryforward; Status: COD: Approved; Category III, referred to San Fernando Valley Bar Association.*

*Resolution: 5-1-81; Title: Unlawful Assembly; Exemption of News Media from Order to Disperse; Status: COD: Disapproved.*

*Resolution: 5-2-81; Title: Controlled Substances; Possession in Correctional Facilities; Status: COD: Approved; Category III, referred to San Bernardino Bar Association.*

*Resolution: 5-3-81; Title: Child Abuse; Definition of Sexual Assault for Reporting Purposes; Status: COD: Action Unnecessary.*

*Resolution: 5-4-81; Title: Carnal Abuse; Sterilization of Certain Offenders; Status: COD: Approved; Category II, SB 1998 (Watson) passed by Senate 5/11/82.*

*Resolution: 5-5-81; Title: Prostitution Laws; Requires Reports to Determine the Cost of Enforcement; Status: COD: Disapproved.*

*Resolution: 5-6-81; Title: Prostitution; Regulation; Status: COD: Disapproved.*

*Resolution: 5-7-81; Title: Criminal Procedure; Instruction on Eyewitness Identification Testimony; Status: COD: Disapproved.*

*Resolution: 5-8-81; Title: Evidence; Psychotherapist Privilege; Status: COD: Approved; Category I, AB 2913 (Goggin) to Governor 6/21/82.*

*Resolution: 5-9-81; Title: Misdemeanor Procedures; Waivers of Personal Presence; Status: COD: Approved as Amended; Category I, AB 3684 (Ingalls) passed by Assembly 5/6/82.*

*Resolution: 5-10-81; Title: Mentally Disordered Offenders; Outpatient Parole; Status: COD: Approved;*

Category III, referred to San Diego County Bar Association.

*Resolution: 5-11-81; Title: Commitment for Narcotics Addiction; Finality for Appeal Purposes; Status: COD: Approved; Category III, referred to San Diego County Bar Association.*

*Resolution: 5-12-81; Title: Creation of Conference Committee; Study of Third-Party Searches; Status: COD: Referred to Conference Committee.*

*Resolution: 6-1-81; Title: Statutory Probate Fees; Adjustments for Excessive or Inadequate Compensation; Status: COD: Disapproved.*

*Resolution: 6-2-81; Title: Probate Fees; Shift from Representative to Attorney; Status: COD: Disapproved.*

*Resolution: 6-3-81; Title: Community Property; Intestate Disposition After Filing of Petition for Dissolution; Status: COD: Disapproved.*

*Resolution: 6-4-81; Title: Probate; Defines "Lease" to Include Option To Purchase; Status: COD: Approved; Category I, AB 3651 (Harris) passed by Senate Judiciary Committee 6/22/82.*

*Resolution: 6-5-81; Title: Summary Probate; Expansion of Proceedings; Status: COD: Referred to Executive Committee.*

*Resolution: 6-6-81; Title: Conservatorship; Substituted Judgment; Status: COD: Approved as Amended; Category II, AB 3530 (Rosenthal) failed passage in Senate Judiciary Committee.*

*Resolution: 6-7-81; Title: Estate and Inheritance Taxes; Disclaimer of Bequest; Status: COD: Approved; Category IV, Referred to Taxation Section.*

*Resolution: 6-8-81; Title: Probate; Calculation of Appraisal Fees; Status: COD: Disapproved.*

*Resolution: 6-9-81; Title: Inheritance Tax; Orphan's Exemption; Status: COD: Approved; Category I, not introduced.*

*Resolution: 6-10-81; Title: Inheritance Tax; Post Mortem Interest on Life Insurance; Status: COD: Disapproved.*

*Resolution: 6-11-81; Title: Inheritance Tax; Limited Power of Appointment; Status: COD: Approved; Category I, not introduced.*

*Resolution: 7-1-81; Title: Attorneys' Fee Orders in Family Law Matters; Mandatory Assignment of Wages; Status: COD: Disapproved.*

*Resolution: 7-2-81; Title: Division of Community Property; Valuation of Property at a Date Other Than Trial; Status: COD: Disapproved.*

*Resolution: 7-3-81; Title: Spousal Support; Examination by Licensed Vocational Counselor; Status: COD: Action Unnecessary.*

*Resolution: 7-4-81; Title: Dissolution and Separation; Duty of Attorney to Advise Client of Rights of Creditors; Status: COD: Action Unnecessary.*

*Resolution: 7-5-81; Title: Dissolution; Satisfaction of Tort Judgment Against Married Person Pending Dissolution; Status: COD: Disapproved.*



*Resolution: 7-6-81; Title: Child Custody; Award of Custody or Visitation to a Nonparent; Status: COD: Approved as Amended; Category I, SB 1944 (Sieroty) passed Senate 5/20/82.*

*Resolution: 7-7-81; Title: Spousal Support; Cohabitation of Supported Spouse; Status: COD: Disapproved.*

*Resolution: 7-8-81; Title: Adoption of Minors; Consent of Natural Parents in Independent Adoptions; Status: COD: Disapproved.*

*Resolution: 7-9-81; Title: Child Custody; Award of Custody and Visitation Rights; Status: COD: Disapproved.*

*Resolution: 7-10-81; Title: Child Custody; Award of Visitation to Stepparents; Status: COD: Approved; Category III, referred to Beverly Hills Bar Association.*

*Resolution: 7-11-81; Title: Custody; Court's Authority to "Grant" Joint Custody and Criteria To Be Considered; Status: COD: Disapproved.*

*Resolution: 7-12-81; Title: Custody Investigation; Availability of Reports to the Parties; Status: COD: Approved as Amended; Category II, not introduced.*

*Resolution: 7-13-81; Title: Paternity and Child Support; Compensation of Counsel Appointed for Indigent Defendants; Status: COD: Approved; Category I, AB 622 (Brown) passed by Senate Judiciary Committee 8/20/81.*

*Resolution: 7-14-81; Title: Paternity and Child Support; Compensation of Counsel Appointed for Indigent*

*Defendants; Status: COD: Approved as Amended; Category I, AB 622 (Brown) passed by Senate Judiciary Committee 8/20/81.*

*Resolution: 7-15-81; Title: Harassment; Records and Enforcement of Temporary Restraining Orders; Status: COD: Action Unnecessary.*

*Resolution: 7-16-81; Title: Harassment; Records and Enforcement of Temporary Restraining Orders; Status: COD: Approved as Amended; Moot, Chapter 182, Statutes of 1981.*

*Resolution: 7-17-81; Title: Domestic Violence Prevention Act; Appointment of District Attorney for Private Enforcement; Status: COD: Approved as Amended; Moot, Chapter 182, Statutes of 1981.*

*Resolution: 7-18-81; Title: Domestic Violence; Duration, Termination, and Extension of Temporary Restraining Orders; Status: COD: Approved; Category II, AB 3569 (Moore) to Governor 6/22/82.*

*Resolution: 7-19-81; Title: Domestic Violence; Restitution to Providers of Related Services; Status: COD: Approved; Category II, AB 3607 (Moorhead) passed by Assembly 5/13/82.*

*Resolution: 7-20-81; Title: Domestic Violence; Restitution for Psychological Care; Status: COD: Approved; Category II, AB 3607 (Moorhead) passed by Assembly 5/13/82.*

*Resolution: 7-21-81; Title: Hospitalization of Minors in Psychiatric Facilities; Preadmission Hearings; Status: COD: Referred to Conference Committee.*

*Resolution: 8-1-81; Title: Right to Privacy; Rights of Women re Family Planning; Status: COD: Approved as Amended; BOG: Declined to take a position, 2/5/82.*

*Resolution: 8-2-81; Title: Affirmative Action; Review of the Public and Private Sector; Status: COD: Referred to Conference Committee.*

*Resolution: 8-3-81; Title: Unemployment; Amendments to Humphrey-Hawkins Act; Status: COD: Disapproved.*

*Resolution: 8-4-81; Title: Repeal of Draft Registration Proclamation; Status: COD: Disapproved.*

*Resolution: 8-5-81; Title: Ratification of Convention on Prevention of Genocide; Status: COD: Approved; BOG: Declined to take a position, 2-5-82.*

*Resolution: 9-1-81; Title: Rate of Interest on Judgments and Prejudgment Interest; Status: COD: Approved as Amended; Category III, referred to Beverly Hills Bar Association.*

*Resolution: 9-2-81; Title: Interest on Damages; Non-contractual Obligations; Status: COD: Disapproved.*

*Resolution: 9-3-81; Title: Rate of Interest; Judgments; Status: COD: Approved as Amended; Category III, same as 9-1-81.*

*Resolution: 9-4-81; Title: Interest on Damages; Unliquidated Claims; Status: COD: Disapproved.*

*Resolution: 9-5-81; Title: Rate of Interest; Judgments; Status: COD: Approved; Chapter 150, Statutes of 1982.*

*Resolution: 9-6-81; Title: Attorneys' Fees; Trial de Novo after Arbitration; Status: COD: Disapproved.*

*Resolution: 9-7-81; Title: Costs; Amount of Tender to Include Attorneys' Fees; Status: COD: Referred to Conference Committee.*

*Resolution: 9-8-81; Title: Attorneys' Fees; Judicial Arbitration Sanctions; Status: COD: Disapproved.*

*Resolution: 9-9-81; Title: Arbitration; Increase of Compensation for Arbitrators; Status: COD: Approved as Amended; Category I, AB 843 (Berman) passed by Assembly 5/22/81.*

*Resolution: 9-10-81; Title: Attorneys' Fees Dispute; Arbitrations; Award of Attorneys' Fees upon Judgment by Court; Status: COD: Approved; Category III, referred to Bar Association of San Francisco.*

*Resolution: 9-11-81; Title: Arbitration; Mandatory Use of Judicial Council Forms for Petition and Response; Status: COD: Approved as Amended; Category III, referred to San Fernando Valley Bar Association.*

*Resolution: 9-12-81; Title: Notice to Health Care Provider Regarding Intention To Bring Action for Professional Negligence; Status: COD: Approved; BOG: 1982 Legislative Program, not introduced.*

*Resolution: 9-13-81; Title: Professional Health Care Providers' Negligence; Discipline of Attorneys for Failure To Comply with Notice Requirement; Status: COD: Approved; BOG: 1982 Legislative Program, not introduced.*



*Resolution: 9-14-81; Title: Professional Health Care Providers; Malpractice; Certificate of Merit; Status: COD: Approved; Category III, referred to Lawyers' Club of Los Angeles County.*

*Resolution: 9-15-81; Title: Statement of Damages In Personal Injury and Wrongful Death Cases; Sanctions; Status: COD: Disapproved.*

*Resolution: 9-16-81; Title: Small Claims Court; Increase of Jurisdictional Limits; Advisory Services; Advisory Committee; Status: COD: Approved as Amended; Category III, referred to Bar Association of San Francisco.*

*Resolution: 9-17-81; Title: Good Faith Settlement; Appeal from Superior Court; Status: COD: Disapproved.*

*Resolution: 9-18-81; Title: Good Faith Settlement; Writ of Mandate; Status: COD: Approved; Category I, AB 3712 (Stirling) passed by Assembly 5/24/82.*

*Resolution: 9-19-81; Title: New Trial; Grounds for Granting; Status: COD: Disapproved.*

*Resolution: 9-20-81; Title: Offer To Compromise; Determination of a More Favorable Judgment; Status: COD: Referred to Conference Committee.*

*Resolution: 9-21-81; Title: Offer To Compromise; Award of Attorneys' Fees; Status: COD: Referred to Conference Committee.*

*Resolution: 9-22-81; Title: Discovery; Expert Witnesses, Exchange of Information; Status: COD: Approved as Amended; Category II, AB 3689 (Ingalls) passed by Senate Judiciary Committee 6/22/82.*

*Resolution: 9-23-81; Title: Discovery; Expert Witnesses, Exchange of Information; Status: COD: Disapproved.*

*Resolution: 9-24-81; Title: Discovery; Expert Witnesses, Timing of Exchange of Information; Status: COD: Disapproved.*

*Resolution: 9-25-81; Title: Discovery; List of Expert Witnesses; Extending Time for Exchange; Status: COD: Approved as Amended; Category II, AB 3689 (Ingalls) passed by Senate Judiciary Committee 6/22/82.*

*Resolution: 9-26-81; Title: Contract Actions; Awards of Attorneys' Fees and Costs to Prevailing Party; Status: COD: Action Unnecessary.*

*Resolution: 9-27-81; Title: Dismissal When Hearing Not Requested Within 90 Days; Status: COD: Disapproved.*

*Resolution: 9-28-81; Title: Costs; Allowance of Photocopying Expense and Actual Service of Process Fees; Status: COD: Approved as Amended; Category III, referred to Beverly Hills Bar Association.*

*Resolution: 9-29-81; Title: Small Claims Court; Representation of Corporation on Appeal from Small Claims Court Judgment; Status: COD: Approved; Category IV, Referred to Committee on Administration of Justice.*

*Resolution: 9-30-81; Title: Civil Procedure; Notice of Appearance and Service of Pleadings; Status: COD: Disapproved.*

*Resolution: 9-31-81; Title: Sister State Judgments; Municipal Court Jurisdiction; Status: COD: Approved as*



Amended; Category I, AB 3712 (Stirling) passed by Assembly 5/24/82.

*Resolution: 9-32-81; Title: Probate and Civil Actions; Elimination of Certain Filing Fees; Status: COD: Approved; BOG: Disapproved as against State Bar policy 12/1/81.*

*Resolution: 9-33-81; Title: Judges; Peremptory Disqualification in Federal Courts; Status: COD: Approved; BOG: Referred to Committee on Federal Courts 2/5/82.*

*Resolution: 9-34-81; Title: Psychotherapist/Patient Privilege; Holder Where Guardian or Conservator Appointed; Status: COD: Approved; Category I, AB 3454 (Bates) passed by Assembly 6/17/82.*

*Resolution: 9-35-81; Title: Rate of Interest; Judgments; Status: COD: Disapproved.*

*Resolution: 9-36-81; Title: Discovery; Order Compelling Answers to Interrogatories; Setting Date Certain for Subsequent Hearing; Status: COD: Disapproved.*

---

#### 1980 RESOLUTIONS

*Resolution: 1-1-80; Title: Paternity; Admissibility of Blood Tests; Status: COD: Approved as Amended; Chapter 266, Statutes of 1981.*

*Resolution: 1-2-80; Title: Adoption of Minors; Consent of Natural Parents in Independent Adoptions; Status: COD: Disapproved.*

*Resolution: 1-3-80; Title: Filing Fees; Obligation of Defaulting Respondent in Dissolution Action; Status: COD: Approved; Chapter 109, Statutes of 1981.*

*Resolution: 1-4-80; Title: Spousal Support; Examination by Licensed Vocational Counselor; Status: COD: Disapproved.*

*Resolution: 1-5-80; Title: Spousal Support; Impairment of Earning Capacity; Status: COD: Disapproved.*

*Resolution: 1-6-80; Title: Spousal Support; Cohabitation; Status: COD: Disapproved.*

*Resolution: 1-7-80; Title: Support Agreements; Court Not Obligated to Make Separate Child Support Order Where "Lester Agreement" Combines Spousal and Child Support; Status: COD: Approved; Chapter 715, Statutes of 1981.*

*Resolution: 1-8-80; Title: Summary Dissolution; Existence of Residential Leasehold; Status: COD: Approved; Chapter 123, Statutes of 1981.*

*Resolution: 1-9-80; Title: Attorneys' Fees; Temporary Award in Family Law Actions; Status: COD: Approved as Amended; Chapter 715, Statutes of 1981.*

*Resolution: 1-10-80; Title: Judgment Lien for Support; Release of Lien by Certificate; Status: COD: Approved; Chapter 822, Statutes of 1981.*

*Resolution: 2-1-80; Title: Rape; Definition; Status: COD: Approved; Category III, referred to Women Lawyers' Association of Los Angeles.*

*Resolution: 2-2-80; Title: Unlawful Sexual Intercourse; Punishment Where Victim Under 12 Years of Age; Status: COD: Disapproved.*

*Resolution: 2-3-80; Title: Sodomy and Oral Copulation by Prisoners; Status: COD: Disapproved.*

*Resolution: 2-4-80; Title: Civil Rights of Prisoners; Personal Visits for the Purpose of Sexual Relations; Status: COD: Approved as Amended; Category III, referred to Bar Association of San Francisco.*

*Resolution: 2-5-80; Title: Theft of Firearm; Punishment; Status: COD: Disapproved.*

*Resolution: 2-6-80; Title: Possession of Stolen Firearm; Punishment; Status: COD: Disapproved.*

*Resolution: 2-7-80; Title: Marijuana; Legalization of Possession, Cultivation and Transportation for Personal Use; Status: COD: Approved as Amended; Category III, referred to Bar Association of San Francisco.*

*Resolution: 2-8-80; Title: Death Penalty Cases; Special Report to the Supreme Court; Status: COD: Disapproved.*

*Resolution: 2-9-80; Title: Criminal Procedure; Closing Argument by Defense; Status: COD: Disapproved.*

*Resolution: 2-10-80; Title: Notification of Appeal Rights; Status: COD: Approved; Rule 535 Adopted by Judicial Council effective 7/1/81.*

*Resolution: 2-11-80; Title: Violation of County and City Ordinances; Classification as Infractions; Status: COD: Approved; Category I, SB 388 (Davis) failed passage in committee 5/6/81.*

*Resolution: 2-12-80; Title: Police Misconduct; Discovery of Police Personnel Records; Status: COD: Approved; Category IV.*

*Resolution: 2-13-80; Title: Searches of Non-privileged Third Party; Further Study; Status: COD: Disapproved.*

*Resolution: 2-14-80; Title: State Special Prosecutor; Status: COD: Disapproved.*

*Resolution: 2-15-80; Title: Assigned Counsel; Compensation and Standards; Status: COD: Approved as Amended; Category I, AB 1439 (Floyd) failed passage in Assembly 1/27/82.*

*Resolution: 2-16-80; Title: Criminal Law; State Funding of Indigent Defense Services; Status: COD: Approved as Amended; Category I, AB 1439 (Floyd) failed passage in Assembly 1-27-82.*

*Resolution: 2-17-80; Title: Removal of Public Defender; Status: COD: Approved; Category II, not introduced, proponent determined to take no action.*

*Resolution: 2-18-80; Title: Fitness of Minor; Appointment and Admissibility of Psychiatric/Psychological Evidence; Status: COD: Approved; Category II, not introduced.*

*Resolution: 3-1-80; Title: Professional Societies; Immunity from Liability for Public Telephone Library Services; Status: COD: Action Unnecessary.*

*Resolution: 3-2-80; Title: Consumer Contracts; Plain English Act; Status: COD: Disapproved.*

*Resolution: 3-3-80; Title: Consumer Contracts; Plain English Act; Status: COD: Disapproved.*

*Resolution: 3-4-80; Title: Loan Commissions; Presumption that Two Percent Is Reasonable; Status: COD: Approved; Category III, referred to San Diego County Bar Association.*

*Resolution: 3-5-80; Title: Property Tax; Counsel for Defense of City; Agent for Service of Process; Status: COD: Approved; Chapter 850, Statutes of 1981.*

*Resolution: 3-6-80; Title: Taxation; Net Operating Loss Carry-back and Carry-forward; Status: COD: Approved; Category IV.*

*Resolution: 3-7-80; Title: Income Taxation; Tax Simplicity Act; Status: COD: Action Unnecessary.*

*Resolution: 3-8-80; Title: Real Property Taxes; Changes of Ownership; Status: COD: Referred to Executive Committee.*

*Resolution: 3-9-80; Title: Subdivision Map Act; Absence of Updated Equalized County Assessment Roll Does Not Prevent Further Subdivision; Status: COD: Approved; Category I, not introduced.*

*Resolution: 3-10-80; Title: Workers' Compensation; Increased Penalty for Unreasonable Delay in Payment; Status: COD: Approved; Category II, not introduced.*

*Resolution: 3-11-80; Title: Labor Law; Penalty for Misrepresentation That Prevents Employment of Former Employee; Status: COD: Approved; Chapter 513, Statutes of 1981.*

*Resolution: 3-12-80; Title: Employment Practices; Religious Accommodation; Status: COD: Disapproved.*

*Resolution: 3-13-80; Title: Practice of Medicine; Over-the-counter Pregnancy Tests; Status: COD: Approved; Category III, referred to Women Lawyers' Association of Los Angeles.*

*Resolution: 4-1-80; Title: Attorneys; Representation of Organizations; Status: COD: Postponed Indefinitely.*

*Resolution: 4-2-80; Title: Attorneys; Avoiding Representation of an Adverse Interest; Status: COD: Postponed Indefinitely.*

*Resolution: 4-3-80; Title: Attorneys; Duty to Prevent or Disclose Violation of Law; Status: COD: Postponed Indefinitely.*

*Resolution: 4-4-80; Title: Rules of Professional Conduct for Prosecutors; Status: COD: Postponed Indefinitely.*

*Resolution: 4-5-80; Title: Attorneys; Standards for Client Communication; Status: COD: Postponed Indefinitely.*

*Resolution: 4-6-80; Title: Attorneys; Limitations on "Revolving Door" Employment; Status: COD: Postponed Indefinitely.*

*Resolution: 4-7-80; Title: Attorneys; Rules for Vicarious Disqualification; Status: COD: Postponed Indefinitely.*

*Resolution: 4-8-80; Title: Attorneys; Written Fee Agreements; Status: COD: Postponed Indefinitely.*

*Resolution: 4-9-80; Title: Admission to Practice; Extension of Time for Hearings as to Moral Character of Applicants; Status: COD: Approved; BOG: Disapproved 2-28-81.*



*Resolution: 4-10-80; Title: State Bar; Adoption of Bylaws; Status: COD: Disapproved.*

*Resolution: 4-11-80; Title: State Bar; Time for Annual Meeting; Status: COD: Disapproved.*

*Resolution: 5-1-80; Title: Attorneys' Fees; Award to Prevailing Party; Status: COD: Approved in 1981 on recommendation of Conference Committee; Category II, not introduced.*

*Resolution: 5-2-80; Title: Attorneys' Fees; Sanctions for Frivolous Motions; Status: COD: Disapproved in 1981 on recommendation of Conference Committee.*

*Resolution: 5-3-80; Title: Summary Judgment; Attorneys' Fees for Motions Made in Bad Faith; Status: COD: Disapproved in 1981 on recommendation of Conference Committee.*

*Resolution: 5-4-80; Title: Attorneys' Fees; Increase in Fees Which Can Be Awarded in Civil Actions to Review Administrative Proceedings; Status: COD: Approved; Category II, AB 1359 (Berman) failed passage in Senate Finance Committee 9/2/81.*

*Resolution: 5-5-80; Title: Privileged Information; Elimination of Disclosure in Hearing on Privilege; Status: COD: Approved as Amended; BOG: 1981 Legislative Program, not introduced.*

*Resolution: 5-6-80; Title: Destruction of Documents Served in Litigated Proceedings; Status: COD: Referred to Executive Committee.*

*Resolution: 5-7-80; Title: Subpoena; Distance Limitation; Status: COD: Approved; Chapter 184, Statutes of 1981.*

*Resolution: 5-8-80; Title: Subpoena Duces Tecum; Service on Records Custodian by Return Receipt Mail; Status: COD: Approved; Category I; AB 1983 (Harris) died in committee.*

*Resolution: 5-9-80; Title: Written Interrogatories; Custody of Original Interrogatories; Service of Original Responses; Status: COD: Approved as Amended; Category II, not introduced, proponent determined to take no action.*

*Resolution: 5-10-80; Title: Requests for Admission of Genuineness of Documents or Truth of Facts; Custody of Original Requests; Service of Original Responses; Status: COD: Approved as Amended; Chapter 225, Statutes of 1981.*

*Resolution: 5-11-80; Title: Discovery; Approved Written Interrogatories; Status: COD: Disapproved.*

*Resolution: 5-12-80; Title: Interrogatories and Requests for Production of Documents; Duty to Supplement Responses; Status: COD: Disapproved.*

*Resolution: 5-13-80; Title: Request for Admission; Sanctions for Improper Failure to Admit; Status: COD: Approved; Category II, AB 1889 (Floyd) died in committee.*

*Resolution: 5-14-80; Title: Venue Jurisdictional in Unlawful Detainer and Consumer Contract Actions; Status: COD: Approved as Amended; Chapter 38, Statutes of 1982.*

*Resolution: 5-15-80; Title: Service by Mail; Extension of Time; When Applicable; Status: COD: Disapproved.*

*Resolution: 5-16-80; Title: Notice of Appeal; Thirty-day Extension of Time Where Petition for Writ Is Denied; Status: COD: Approved; BOG: Referred to Committee on Administration of Justice.*

*Resolution: 5-17-80; Title: Discovery in Administrative Proceedings; Witness Lists and Copies of Documents; Status: COD: Approved as Amended; Category III, referred to Lawyers' Club of Los Angeles.*

*Resolution: 5-18-80; Title: Statute of Limitations; Tolling Time for Cross-complaint; Status: COD: Disapproved.*

*Resolution: 5-19-80; Title: Zoning Appeals; 180-day Statute of Limitations Applied to Charter Cities; Status: COD: Approved; Category I, SB 1108 (Speraw) passed by Assembly Housing and Community Development Committee 3/3/82.*

*Resolution: 5-20-80; Title: Appeals from Writs; No Appeal Where Writ Directed to a Municipal or Justice Court; Status: COD: Approved as Amended; Category III, referred to Los Angeles County Bar Association.*

*Resolution: 5-21-80; Title: Service by Return Receipt Mail; Status: COD: Approved as Amended; Category II, AB 1890 (Floyd) died in committee.*

*Resolution: 5-22-80; Title: Small Claims Court; Increasing Jurisdictional Limitation; Status: COD: Approved; Chapter 957, Statutes of 1981.*

*Resolution: 5-23-80; Title: Homestead; Execution on Real Property; Jurisdiction to Determine Validity of Liens;*

*Status: COD: Disapproved in 1981 on recommendation of Conference Committee.*

*Resolution: 5-24-80; Title: Law & Motion; Uniform Time for Filing; Status: COD: Postponed Indefinitely.*

*Resolution: 5-25-80; Title: Medical or Dental Malpractice; Certificate of Merit by Attorney; Status: COD: Approved; Category II, AB 1636 (Moorhead) died in committee.*

*Resolution: 5-26-80; Title: Subpoena Duces Tecum re Deposition; Filing and Service of Supporting Affidavit; Status: COD: Approved as Amended; Chapter 189, Statutes of 1981.*

*Resolution: 5-27-80; Title: Mechanic's Liens; Definition of "Claim of Lien"; Requirements for Recordation; Status: COD: Approved; Chapter 321, Statutes of 1981.*

*Resolution: 6-1-80; Title: Election of Judges; "No Opponent" Elections for All Judges; Status: COD: Disapproved in 1981 on recommendation of Conference Committee.*

*Resolution: 6-2-80; Title: Election of Judges; "No Opponent" Elections Optional for Municipal and Justice Courts; Status: COD: Disapproved in 1981 on recommendation of Conference Committee.*

*Resolution: 6-3-80; Title: Judicial Selection; Merit Selection Commissions; Status: COD: Disapproved in 1981 on recommendation of Conference Committee.*

*Resolution: 6-4-80; Title: Compensation of Judges; Increase in Time Limits After Submission; Status: COD:*

Approved as Amended; Category III, referred to Santa Clara County Bar Association.

*Resolution: 6-5-80; Title: Law and Motion; Tentative Rulings; Uniform Time for Filing; Status: COD: Approved as Amended; Chapter 197, Statutes of 1981.*

*Resolution: 6-6-80; Title: Hearing in Supreme Court; Time Limitations; Status: COD: Approved; Category IV.*

*Resolution: 6-7-80; Title: Attire of Attorneys in the Courtroom; Status: COD: Disapproved.*

*Resolution: 7-1-80; Title: Alcohol and Drug Program; County Funding Must Reflect Parity of Services for Women; Status: COD: Approved; Category III, referred to Women Lawyers' Association of Los Angeles.*

*Resolution: 7-2-80; Title: Birth Certificates; Separation of Names from Health and Statistical Information; Status: COD: Postponed Indefinitely.*

*Resolution: 7-3-80; Title: Paternity Investigation; Limitations; Status: COD: Approved as Amended; Category II, not introduced.*

*Resolution: 7-4-80; Title: Establishment of Committee to Report on Civil Liberty Violations; Status: COD: Referred to Executive Committee.*

*Resolution: 7-5-80; Title: Banks; Deposit of State Funds; Apartheid Governments; Status: COD: Disapproved.*

*Resolution: 7-6-80; Title: Affirmative Action; Special Committee to Study Employment and Education Programs; Status: COD: Approved as Amended; Report of*

Human Rights Committee Referred to Conference Committee in 1981.

*Resolution: 7-7-80; Title: Abortion; Amicus Curiae Brief Opposing Limitations on Federal Funding; Status: COD: Action Unnecessary.*

*Resolution: 8-1-80; Title: Probate; Notice of Petition for Probate of Will; Status: COD: Action Unnecessary.*

*Resolution: 8-2-80; Title: Probate; Notice of Petition for Letters of Administration; Status: COD: Action Unnecessary.*

*Resolution: 8-3-80; Title: Probate; Publication of Notice; Status: COD: Approved; Category III, referred to Alameda County Bar Association.*

*Resolution: 8-4-80; Title: Probate; Publication of Notice; Status: COD: Approved; Category III, referred to Fresno County Bar Association.*

*Resolution: 8-5-80; Title: Probate; Procedure for Challenging Appraisals; Status: COD: Disapproved.*

*Resolution: 8-6-80; Title: Probate; Removal of Executor; Status: COD: Postponed Indefinitely.*

*Resolution: 8-7-80; Title: Probate; Attorneys as Executors; Status: COD: Disapproved.*

*Resolution: 8-8-80; Title: Probate; Executor and Attorneys' Fees; Status: COD: Disapproved.*

*Resolution: 8-9-80; Title: Trusts; Compensation of Trustee's Advisors; Status: COD: Approved; Category I, not introduced.*



*Resolution: 8-10-80; Title: Probate; Arrangement for Payment of Federal Estate Taxes Before Final Distribution; Status: COD: Approved; Category II, not introduced, proponent determined to take no action.*

*Resolution: 8-11-80; Title: Inheritance Tax; Expanded Definition of "Class A" Transferees; Status: COD: Disapproved.*

*Resolution: 8-12-80; Title: Interitance Tax; Increased Exemption Amount; Status: COD: Approved; Category III, referred to Long Beach Bar Association.*

*Resolution: 8-13-80; Title: Inheritance Tax; "Class A" Transferees; Increased Exemption Amount; Status: COD: Action Unnecessary.*

*Resolution: 8-14-80; Title: Gift Tax; "Class A" Donees; Increased Exemption Amount; Status: COD: Action Unnecessary.*

*Resolution: 8-15-80; Title: Taxation; California Inheritance Tax; Status: COD: Approved; Category III, referred to Alameda County Bar Association.*

*Resolution: 8-16-80; Title: Inheritance Tax; Inter Vivos Transfers; Status: COD: Approved; Category III, referred to San Diego County Bar Association.*

*Resolution: 8-17-80; Title: Probate; Appointment of Multiple or Joint Guardians; Status: COD: Approved; Category III, referred to Alameda County Bar Association.*

*Resolution: 9-1-80; Title: Required Offering of Sex Education Classes; Status: COD: Approved; Category III, referred to Women Lawyers' Association of Los Angeles.*

*Resolution: 9-2-80; Title: Opposition to the United States Trade Embargo of Cuba; Status: COD: Disapproved.*

*Resolution: 9-3-80; Title: U. S. Presidency; Limits Elected President to a Single Six-year Term; Status: COD: Disapproved.*

*Resolution: 9-4-80; Title: Lieutenant Governor; Limitations on Power; Status: COD: Disapproved.*

*Resolution: 9-5-80; Title: Federal Budget; Transfer of Military Funds to the Needs of the Inner Cities; Status: COD: Disapproved.*

*Resolution: 9-6-80; Title: Department of Health Services to Establish DES Program; Status: COD: Approved; Chapter 776, Statutes of 1980.*

*Resolution: 9-7-80; Title: Child Care Facilities for State Employees; Status: COD: Disapproved.*

*Resolution: 9-8-80; Title: Wild and Scenic Rivers Act; Addition of Portions of the Stanislaus River; Status: COD: Approved.*

---

## - ATTACHMENT L

(Seal) NEWSRELEASE

THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET  
SAN FRANCISCO, CALIFORNIA 94102CONTACT: Mari Weaver  
(415) 561-8288STATE BAR PRESIDENT OPPOSES CONTRACT  
DEFENSE SYSTEMS

LOS ANGELES, April 6 – State Bar of California President Anthony Murray of Los Angeles today criticized the trend toward counties contracting for criminal defense services and cutting back or eliminating public defenders' offices as an approach "that replaces the standard of effective counsel with a new standard of efficient counsel" and threatens to "give lip service to the right to counsel, while providing the bare minimum."

At a state bar-sponsored symposium here on criminal defense services, Murray said the contract system of meeting the criminal defendant's constitutional right to counsel "builds in a strong, and often irresistible, financial incentive to dispose of cases quickly and early. It creates an economic disincentive to a complete and thorough defense."

Murray's comments focused on approaches taken in a number of California counties, including San Diego and portions of Los Angeles, to replace or supplement a public defender with private contracts with lawyers and law

firms. The system has gained popularity in recent years in California and across the country as a method of cutting the cost of providing legal services for criminal defendants too poor to afford to hire a lawyer. In California, the counties bear the brunt of the cost for providing indigent defense services, and most counties have seen their budgets slashed in recent years.

But Murray blasted "the budgetary solution that is so attractive to counties living under the sword of Proposition 13" – putting out legal services contracts to competitive bid and awarding the contract to the lowest bidder, while cutting back or doing away with the public defender's office. In other cases, he said, contracts are awarded to lawyers willing to handle a specific number of cases for a flat fee, which Murray said allows the lawyer "to realize his financial reward only by arranging early disposition and minimizing his efforts in behalf of his clients." Either approach, he said, sacrifices quality for lower costs.

"Up and down the state, counties are looking for ways of providing cheaper legal services," Murray said. "The question now debated by Boards of Supervisors is: How can we provide less? And the unspoken question: How can we give lip service to the right of counsel while providing the bare minimum?"

"No one suggests that the public prosecutor's office should be eliminated, or that we should be satisfied with 'minimally-adequate' prosecution of crime," Murray said. "And no one suggests that prosecution services should be put out to private bid."

The state bar president strongly discouraged the use of a contract system for handling "conflict cases" – those which the public defender is unable to handle due to a conflict of interest – in the Central District of Los Angeles, where such a proposal now is being considered by the Los Angeles County Board of Supervisors. He cited numerous problems in San Diego County, where a contract system substitutes for a public defender. Among other things, he said, "the best lawyers boycott the system."

"There is an irreconcilable conflict between a system designed to provide the cheapest-possible services, and the need to provide effective representation," Murray said.

The three-day Los Angeles symposium, titled "Fiscal Crisis: The Administration of the Criminal Justice System in the Coming Decade," is the third and final conference on the subject of contract and other defense systems sponsored by the Committee on the Delivery of Legal Services to Criminal Defendants of the state bar's Legal Services Section. The committee will prepare a report based on the testimony of defense lawyers, judges, county officials and others it has received at this and the two earlier symposia last year.

In his opening comments at today's meeting, Murray urged the committee to adopt recommendations "supporting the public defender system as the primary defense provider; insisting that any backup services, for conflicts or overflow, be judged by quality instead of

solely by cost; and opposing the fixed-price private contract system as inconsistent with the public obligation to provide effective assistance of counsel."

The symposium continues all day Thursday, April 7, and until noon on Friday, April 8, at the Criminal Courts Building in Los Angeles, 210 West Temple Street.

---

(Seal) NEWSRELEASE

THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET  
SAN FRANCISCO, CALIFORNIA 94102

---

CONTACT: Mari Weaver  
(415) 561-8288

#### STATE BAR OPPOSES CUTS TO STATE PUBLIC DEFENDER'S OFFICE

SAN FRANCISCO, February 26 – The Board of Governors of The State Bar of California today indicated strong support for the Office of the State Public Defender and opposed any reduction of services that would result from budget cuts Governor George Deukmejian is proposing for next year.

The board's action at its monthly meeting here came in response to Governor Deukmejian's proposed 1983-84 budget in which the State Public Defender's allotment is cut from its present \$7.6 million level to \$3.9 million.



Calling the reduction a "meat-axe approach," state bar President Anthony Murray of Los Angeles said, "In my view, this represents the hostility of the Governor's office to the concept of a state public defender."

Similar concerns about the effects of the proposed cuts on the quality of defense provided for the poor have been expressed by the state Supreme Court, The Bar Association of San Francisco, the Los Angeles County Bar Association and many appellate justices.

In other action at this meeting, the board:

\*Approved a state legislative proposal that would permit the release of certain nonviolent prisoners when prisons become overcrowded. SB 50 (Presley, D-Riverside) is an emergency stopgap measure that during the next three years would permit the state Department of Corrections to advance the release dates of nonviolent prisoners by as much as three months when the state prison system's population exceeds 120 per cent of capacity.

\*Opposed two proposed state constitutional amendments that would shorten the terms of office and require contested elections for state Supreme Court and appellate court justices. ACA 12 (Statham, R-Redding) would halve the present 12-year-term for justices on both courts to six years, while ACA 15 (Bradley, R-Escondido) would replace the present requirement for confirmation votes after a justice is appointed with contested, nonpartisan races. The state bar contends that the amendments would erode judicial independence by injecting politics into judicial decision-making. Proponents argue the measures would increase justices' accountability to voters.

\*Approved proposed revisions to the state Code of Civil Procedure that would, among other things, create a procedure for the forced disqualification of appellate justices from hearing certain cases, define the circumstances under which judges should disqualify themselves from cases because of relationships with clients or lawyers, and strictly limit a judge's ability to act on a case after a statement calling for the judge's disqualification was filed.

\*Approved a proposed amendment to the state Civil Code that would permit a court to order one spouse to leave a family home during divorce proceedings if, after a court hearing, the court is convinced that one spouse may physically or emotionally harm the other. Currently, courts require evidence of an assault or threat of an assault before they will exclude either spouse from the home.

\*Approved a proposed amendment to the state Civil Code that would extend to lawyer referral services a three-year time limit on the service's duty to disclose to the public the disciplinary record of panel members. While most professional referral agencies now operate under the three-year limit, lawyer referral services must report any disciplinary action against their members, no matter how long ago the discipline occurred. The proposed amendment to the Civil Code was approved last September by the state bar's Conference of Delegates, representing local bar associations throughout the state.

\*Approved a proposed amendment to the State Penal Code that would provide workers' compensation coverage to attorneys who volunteer as special masters to

accompany law enforcement personnel when search warrants are issued against lawyers, doctors, psychotherapists or clergymen.

\*Recommended that the state Judicial Council adopt court rules that would permit a single judge to preside over all aspects of a complex case. Under current state court rules, pretrial proceedings are handled by one or more judges while a different judge presides over a trial. According to the state bar's Committee on Administration of Justice, a single judge could handle complex cases more efficiently.

\*Amended the rules of the state bar's Commission on Judicial Nominees Evaluation to permit members of the state bar's Board of Governors to attend committee meetings and hear confidential information. Under state law, the commission reviews the qualifications of all persons under consideration for judicial appointment to California's trial or appellate courts. The amendment would impose on the board members the same prohibitions that now apply to commission members against disclosing confidential information about a judicial candidate.

\*Amended the state bar's Rules of Procedure under which the State Bar Court places a mentally or physically incapacitated lawyer on inactive status. The changes are aimed at eliminating delays that now occur, particularly in the investigative stages of incapacity proceedings.

\*Provided \$5,000 to fund an *ad hoc* committee to study whether to create a civil litigation section of the state bar.

\*Approved an application by the Women Lawyers of Placer County to be represented in the state bar's Conference of Delegates.

\*Agreed to co-sponsor with Law in a Free Society a California Conference on Youth Education for Citizenship scheduled for March 15-17 in Sacramento.

The next meeting of the board will be held Saturday, March 26 at 9 a.m. at the bar's Los Angeles office, 1230 West Third Street. The meeting will be open to the public, except for closed agenda items.

---

(Seal) NEWSRELEASE

THE STATE BAR OF CALIFORNIA

DIVISION OF COMMUNICATIONS

555 FRANKLIN STREET

SAN FRANCISCO, CALIFORNIA 94102

---

CONTACT: Mari Weaver  
(415) 561-8280

#### STATE BAR PRESIDENT CALLS ATTACKS ON JUDGES POLITICALLY MOTIVATED

SAN FRANCISCO, October 8 - State Bar of California President Anthony Murray today issued the following response to the formation of "Californians for Judicial Reform," a committee led by various Republican party leaders and organized to campaign for the defeat of three

new justices of the state Supreme Court whose names will appear on the November 2 state ballot for voter approval of their 12-year appointive terms in office.

False and misleading statements made by a newly-formed committee of political partisans campaigning to defeat three California Supreme Court justices in the November election must be collected.

The committee, which calls itself "Californians for Judicial Reform," claims it is not trying to politicize the judiciary. This claim cannot be accepted. Committee members are Republican party officials and candidates for office. Its leaders are the Republican candidates for Attorney General, Lieutenant Governor and the Assembly, and a chairperson of the Santa Barbara County Republican Central Committee.

The names of the three justices will appear on the ballot in an uncontested election that, according to law, must be nonpartisan. The Republicans' attack on the justices is a illegible disguised and deplorable attempt to drag the Supreme Court into partisan politics and to accomplish political goals at the expense of our system of justice. The politicians want to remove the justices so they can appoint their own supporters if their candidate for Governor is elected.

The New Committee's claim that judges appointed by Governor Brown are "activists" and "pro-defendant" is as irresponsible as it is inaccurate. In 1981, 86.3 per cent of the persons charged with felonies in California were convicted. California imprisons a higher percentage of its criminal offenders than any other state or any other nation with available statistics, with the exceptions of South Africa and the Soviet Union. In 1977, 10,400 persons were committed to prison

in California; in 1982, 19,000 persons already have been sent to prison. *Per capita* prison commitments have increased approximately 80 per cent in five years, and California's prisons are now so overcrowded that their population has reached 125 per cent of capacity.

The Committee's leaders accused the California Supreme Court of "flip-flopping" on certain cases on which the court's decision was changed after rehearing. But the Committee did not reveal the fact that *none of the three justices whom the Committee is trying to unseat was on the Court or even had been appointed when those decisions were made.* Nevertheless, the politicians used those cases against the justices who had nothing to do with deciding them.

These unfair political tactics must be exposed. Nothing could be more destructive to our democratic system, which depends on a judiciary that is independent of partisan politics and that has the courage to decide cases on the facts and the law, not to please the politicians.

---



(Seal) NEWSRELEASE

THE STATE BAR OF CALIFORNIA

DIVISION OF COMMUNICATIONS

555 FRANKLIN STREET

SAN FRANCISCO, CALIFORNIA 94102

CONTACT: Mari Weaver  
(415) 561-8280

STATE BAR GOVERNING BOARD LAUNCHES  
PUBLIC EDUCATION PROJECT ON  
JUDICIAL INDEPENDENCE

SAN FRANCISCO, October 1 - The Board of Governors of the State Bar of California today unanimously adopted a resolution intended to launch a public education project aimed at fostering "understanding and respect for constitutional principles concerning the 'rule of law,' the 'separation of powers,' and the 'nonpartisan' nature and role of the court system and judicial offices."

State bar President Anthony Murray of Los Angeles called the action an "historic" occasion in the bar's long involvement in preserving the independence of the judiciary, and said the unanimous approval of the resolution was "gratifying and appropriate."

"This is not an issue that should divide the bar down partisan political lines," he said. "The preservation of an independent judiciary is and properly should be an issue on which the legal profession is united."

In its resolution, the board declared that the federal and state constitutions require judges "to decide cases properly before them solely on the merits and to do so independently of partisan political pressures or considerations; to exercise the power of judicial review; to decide whether an enactment of the legislature or the voters is constitutional; and to overturn enactments of the legislature or the voters if they conflict with higher law."

"It is the duty of attorneys under law to support the Constitution and laws of the United States and of this state, and to maintain the respect due to the courts of justice and judicial offices," the resolution says.

The resolution calls for the state bar and its members to:

\*Take steps to maintain and promote understanding and confidence in the need for an independent judiciary.

\*Explain "the differences between valid, constructive criticism of the decisions and processes of our courts, on the one hand, and on the other hand, unfounded criticism which erodes our system of justice."

\*Assist the public in understanding the responsibility of the courts "to strike that elusive and proper balance between the constitutional rights of the accused in criminal cases and the rights of society which must be protected from criminal conduct."

Murray says a packet of information included a sample speech on judicial independence, pertinent statistics and various "how to" guides immediately will be mailed to California local bar associations and other groups to facilitate their participation in the statewide public education effort.

SEAL NEWSRELEASE  
 THE STATE BAR OF CALIFORNIA  
 DIVISION OF COMMUNICATIONS  
 555 FRANKLIN STREET  
 SAN FRANCISCO, CALIFORNIA 94102

---

CONTACT: Mari Weaver  
 (916) 444-2018  
 (415) 561-8280

#### NEW STATE BAR LEADER VOWS TO DEFEND JUDICIAL INDEPENDENCE

SACRAMENTO, September 12 – Attorney Anthony Murray of Los Angeles today used the occasion of his swearing in as president of The State Bar of California to announce a statewide program to educate the public about the role of the judiciary and to defend California judges against political attack. In his remarks, which were interrupted by applause nine times, Murray criticized what he called “the idiotic cries of self-appointed vigilantes” who threaten to campaign against the election, retention or confirmation of judges for political reasons.

Declaring that the defense of the judiciary would be the highest priority of his term in office, Murray called upon the representatives of local bar associations assembled for the state bar’s Annual Meeting and Conference of Delegates to join in a statewide project that will include public speeches and resolutions by local and state bar leaders. Murray said that the state bar will provide advice and sample materials to “maximize the effectiveness of the campaign.”

“We must make it clear that the only legitimate basis for refusing to retain or for recalling a justice is a showing of incapacity or misconduct in office,” Murray said, explaining that the courts’ role of reviewing the constitutionality of enactments of the legislature or the voters is, by definition, “antimajoritarian.” “They are required to overturn the popular will if it conflicts with a higher law,” the newly-installed head of the official organization of California’s 75,000 attorneys said of the courts. “That is their absolute responsibility.”

He said it was likely that attacks on the judiciary would be stepped up “in the weeks and months ahead” as the state Supreme Court may be called upon to consider challenges to the constitutionality of various provisions of Proposition 8, the so-called “Victims Bill of Rights” approved by the voters in June. Recently, the court upheld the measure as complying with the constitutional requirement that a ballot initiative embrace only one subject, but it left open the possibility of hearing future challenges to specific provisions of Proposition 8.

“Already, the political opportunists hail the court’s Proposition 8 decision as a political victory, claiming that the decision represents a surrender to political pressure,” said Murray. “We can be assured that they will now increase the pressure to try to keep the court in line as it meets the challenges ahead. Nothing could be more destructive to our legal system.”

At a press conference following his speech, Murray said that other priorities of his one-year term as state bar president include improving conditions in California’s prisons, raising the level of competence of the state’s



attorneys by instituting state bar certification of trial specialists and a Litigation Section of the state bar, and increasing access to legal services for low-income Californians.

Predicting "a hemorrhage of violence comparable to Attica and New Mexico" in California's prisons, Murray, who recently participated in an inspection of several prisons by the Executive Committee of the state bar's Criminal Law Section, said, "Everything about the prisons is bad."

Murray, 45, is a partner in the Los Angeles law firm of Ball, Hunt, Hart, Brown and Baerwitz. A member of the American Academy of Trial Lawyers, Murray has served on the Board of Governors of the Long Beach Bar Association and chaired the state bar's Criminal Law Section. He also has been a member of the state bar's Disciplinary Board and served on the state bar's Commission on Judicial Nominees Evaluation.

A native Californian, Murray received his J.D. from Loyola University School of Law in 1964 and became a member of the bar in 1965.

---

#### INDEPENDENCE OF THE JUDICIARY

A Speech by Anthony Murray President of The State Bar of California at his Swearing-in Ceremony at the 1982 State Bar Annual Meeting Sunday, September 12, 1982

This is a day of great pride for me. I am proud to succeed Sam Williams, who has truly been one of our

greatest presidents. May I ask you to join me now in acknowledging his outstanding work for our profession.

I am proud to stand here as a part of this great bar association: the largest state bar in the nation; the largest self-regulating agency in the world; the recognized leader among the bar associations in this country.

I am especially proud because the organized bar throughout history has repeatedly shown that it stands for principle, and that it can and will defend the great traditions that drive our legal system.

That is the lesson of history, but history is often a poor teacher. The philosopher George Santayana told us that "Those who cannot remember the past are condemned to repeat it." Today, in California, we have been condemned to repeat a part of our past. It's a sad chapter for lawyers, one that is repeated over and over again.

I refer to the recent attacks upon our courts. We can expect those attacks to increase in the weeks and months ahead. The Supreme Court's recent decision rejecting a preliminary challenge to Proposition 8, the so-called "Victims' Bill of Rights," was only an opening skirmish. The real war will soon be fought, when the court receives the onslaught of challenges to the specific provisions of Proposition 8.

Already, the court's opponents hail the Proposition 8 decision as a *political* victory, claiming that the decision represents a surrender to political pressure. We can be assured that they will now increase the pressure to try to keep the court in line as it meets the challenges ahead.



Nothing could be more destructive to our legal system. The genius of that system, and the part that the ignorant and ambitious find easiest to attack, is judicial independence: the notion that the courts must operate outside and independently of politics.

The principle was established early in the development of this nation. Just 29 years after the Declaration of Independence, the principle was put to a major test. Let's take a minute to remember our past as we prepare for the future. The year was 1805, the year the Senate of the United States conducted a celebrated impeachment trial. The named accused was Samuel Chase, Associate Justice of the United States Supreme Court. The real accused was judicial independence.

Justice Chase was a Federalist on a Federalist-dominated court, but the Republicans held the political power and wanted to purge the court of Federalists. They started with Justice Chase. Does that sound somewhat familiar? Except for the names, that story could be our story, in 1982. The presiding officer was Aaron Burr, Vice President of the United States. Justice Chase was defended by Luther Martin, the greatest trial lawyer of the time. One of the witnesses was John Marshall, Chief Justice of the United States.

The dilemma for the Republican politicians was the one that always confronts ambitious politicians who attack the courts for personal gain. They had no legally sufficient reason to remove Justice Chase. The law was against them. They wanted to impeach him as a first step in removing all the other Federalist justices, including Marshall; but Chase had not committed any high crimes

or misdemeanors which would justify impeachment under the Constitution.

The solution was the one that has been adopted throughout history: forget the legal reasons; attack the judge's *opinions* and *philosophy*. The politicians did that, and went even further. The chief architect of the impeachment campaign, Senator William Branch Giles, boldly announced that *judicial independence itself* was intolerable; that the courts were nothing more than an arm of the executive and legislative branches; and that the Senate had the authority to remove a judge if he is "disagreeable in his office, or wrongheaded."

Senator Giles shamelessly declared, in words that are disturbingly familiar today, that:

"A removal by impeachment was nothing more than a declaration by Congress to this effect: you hold dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the nation. *We want your offices, for the purpose of giving them to men who will fill them better.*"

It was the good fortune of the nation that the Senate did not yield to the appeals of the political opportunists. It rose above partisanship. It rejected the sophistry that a judge can be removed because the politicians disagree with his judicial philosophy. The Senate declined to impeach Justice Chase, refusing to abandon the principle of judicial independence.

That was 1805. What have we learned about judicial independence since then? Sad to say, down through the 177 years since the Chase trial, we have been condemned to repeat that story, over and over again. In our own time

we have witnessed the scandalous attempts to impeach our greatest Chief Justice, Earl Warren. In California, we saw the politicians assault the great Traynor Supreme Court. And now we again suffer the hysterical, "soft-on-crime" rantings of the assailants of our own Supreme Court.

We hear of a candidate for national office, himself a lawyer, who threatens a recall of our Chief Justice if the Supreme Court dares to overturn Proposition 8; and he says the Chief Justice should be recalled *regardless of the grounds* on which the court might invalidate Proposition 8. Shades of the Chase trial. "Forget the law." "You hold dangerous opinions." "You are wrong-headed." "We want your job so we can give it to someone whom we decide is right-headed."

We hear the idiotic cries of the self-appointed vigilantes: the committee on law and order; the court watchers; the self-seeking prosecutors and lawyers who want to be judges; and every unscrupulous politician who thinks there is something in it for him if he gets in line to kick the courts which he sees as inert and defenseless. But the surprise is that our courts are not defenseless. They have the bar. They have always had the bar. They have us as the defenders of the courts. And we are defending them. From San Diego, to Los Angeles, to San Francisco, to Sacramento, the bar is rising to denounce these attacks.

It is a curious truth that the strength of our legal system is also its weakness. The great paradox is that the more the courts exercise independence from politics, the more they expose themselves to attacks based on politics.

Why does our system seem almost to invite attacks upon the courts by unscrupulous politicians? The answer lies in the nature of the duties the system asks our courts to perform. We say to the courts, "This is our Constitution. We charge you to tell us what it means." The courts must reduce to concrete terms such sublime but ethereal phrases in the California Constitution as, "All people are by nature free and independent." The court must give specific content and application to declarations that everyone has inalienable rights to "life," "liberty," "safety," to "happiness," and to "privacy." And if the courts translate the right to "happiness" into specific legal rights and duties, there will always be someone around who will say that "'happiness' doesn't mean that", so the judges who gave it that meaning should be cashiered, defeated at the polls.

That's part of the squeeze on the courts. The other part is that the courts are called upon to exercise the power of judicial review, the responsibility of deciding whether an enactment of the legislature or of the voters is constitutional. To discharge that role, the courts by definition must be antimajoritarian. They are required to overturn the popular will if it conflicts with a higher law. That is their absolute responsibility. Overturning the popular will is not popular. But in giving them that responsibility, the system casts the courts in a nearly suicidal position. The courts occupy the unenviable role of policeman for the system. We mistrust absolute, unreviewable democracy, and so we ask the courts to police the works of democracy. And when they do so they are accused of "flouting the will of the people." And around and around we go.



The bullies of our land are out to beat up on the courts, and California is not the only place where they are throwing their weight around. It seems that across the nation, wherever there is an election, the judges are called "soft on crime." In a recent editorial, the New York Times cited the spectacle of the two Republican candidates for governor, each trying to go one better in attacking New York's highest court. Said the Times, "With equal fervor, they vowed to appoint only 'tough-minded' jurists when the tender-hearted incumbents retire." The editorial concluded by proposing the only effective antidote to such poison: "Bar associations and lawyers had better prepare to defend the bench against the bullies."

In California there are many opportunities to gang up on the courts. We have retention elections for Supreme Court justices. We have recall petitions. And the same crusaders who use and manipulate these procedures as swords have invented another weapon that is far more dangerous. They call it a "Victims' Bill of Rights." This bomb will soon roll into the Supreme Court, and once again the system will call upon the court to defuse the bomb before it blows us apart.

Proposition 8 is a simplistic, almost childish, but extremely dangerous measure. It pretends to deal with the deep complexities of crime by throwing slogans at the problem. It piously declares that there is a "right to safe schools" and does nothing to make schools safe. The ultimate irony is that it leaves to the courts, the same courts that its sponsors revile so much, the job of making the schools safe. It tampers with the right to privacy, the right to bail, the insanity defense, diminished capacity, admissible evidence, and a host of other diverse subjects.

A hail of new challenges to the effects of Proposition 8 will soon rain down upon the court: denial of bail; use of illegally-obtained evidence; prohibition of plea-bargaining; the prejudicial effect of evidence no longer excluded. And the justices are expected to deal with these issues and all the while to remain unaffected by all of the jeering and threatening; they must not allow the pressure to affect their ability to perform the awesome quantities of work that flood the court in greater amounts each year.

Last year, the Supreme Court disposed of 3,179 petitions for hearing; that's 265 a month, nearly nine petitions every day of the year. In addition, the court decided 114 cases on the merits, and 27 death penalty cases came to the court by automatic appeal.

And most astonishing of all, the court performs these prodigious tasks without the slightest suggestion that it is yielding to the pressure. Now it is time for the bar to do its part. We need concrete action and we need it now.

We must make clear that the only legitimate basis for refusing to retain or for recalling a justice is a showing of incapacity or misconduct in office. We must point out that even the loudest of the Supreme Court's opponents do not suggest that there is the slightest evidence of incapacity or misconduct in office. We must make it clear that judges cannot be removed because the politicians disagree with their judicial philosophies or with specific opinions. Any other rule would replace judges with pollsters. Courts would never render a decision without first raising a finger to the political wind. That was not our system when this nation was formed, and we won't allow it to become our system today.



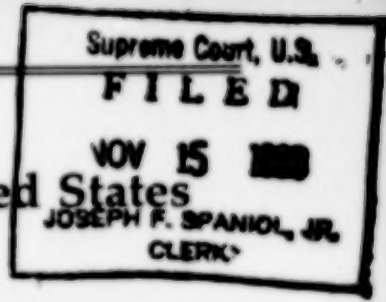
In the next few days I will be proposing a specific plan of action:

- The plan will enlist the help of the local bars to speak out and to describe the need for an independent judiciary.

- It will provide specific materials to the local bars to help develop speeches, speakers' bureaus, media contacts, and other programs without delay.

I call upon you as leaders of our profession to join the long and honorable tradition of the bar and to rise in defense of our courts. I ask you to mobilize support in your communities, and to denounce these political mercenaries who are trying to pull down our legal system. The preservation of our independent judiciary can be your legacy for the future of the law. That's what the bar is all about. And that is why I am so deeply honored to be a part of it.

---



In The  
**Supreme Court of the United States**  
 October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

On Writ of Certiorari in the Supreme Court of California

JOINT APPENDIX  
 VOLUME III

HERBERT M. ROSENTHAL  
 \*DIANE C. YU  
 \*Counsel of Record  
 555 Franklin Street  
 San Francisco, CA 94102  
 (415) 561-8200  
*Attorneys for Respondents*  
 (Additional Counsel listed  
 on inside cover)

RONALD A. ZUMBRUN  
 JOHN H. FINDLEY  
 \*ANTHONY T. CASO  
 \*Counsel of Record  
 PACIFIC LEGAL FOUNDATION  
 2700 Gateway Oaks Drive, Suite 200  
 Sacramento, CA 95833  
 Telephone: (916) 641-8888  
*Attorneys for Petitioners*

Petition for Certiorari filed May 24, 1989.  
 Certiorari granted October 2, 1989.

191 P2

HUFSTEDLER, MILLER, KAUS  
& BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

JUDITH R. STARR

355 South Grand Avenue

45th Floor

Los Angeles, CA 90017

(213) 617-7070

*Attorneys for Respondents*



## TABLE OF CONTENTS

Page

## VOLUME I

Chronological List of Relevant Docket Entries.....	1
Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief .....	2
Amendment to Petition for Writ of Mandate and Com- plaint for Declaratory and Injunctive Relief .....	27
Second Amendment to Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief .....	31
Answer .....	35
Memorandum of Points and Authorities in Opposi- tion to Motion for Preliminary Injunction.....	40
Exhibit 2 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction .....	75
Exhibit 5 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction .....	126
Declaration of Mary G. Wailes in Support of Defen- dants' Opposition of Motion for Preliminary Injunction.....	155
Declaration of Magdelene Y. O'Rourke in Support of Defendants' Opposition of Motion for Preliminary Injunction.....	198

## VOLUME II

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction-Errata .....	214
First Amended Answer (C.C.P. § 472).....	216

## TABLE OF CONTENTS - Continued

	Page
Order Denying Preliminary Injunction and Dissolving Temporary Restraining Order.....	222
Second Amended Answer .....	225
Declarations in Support of Motion for Summary Judgment .....	232
Index to Attachments to Motion for Partial Summary Judgment .....	234
VOLUME III	
Supplemental Points and Authorities in Support of Defendants' Motion for Summary Judgment and [Defendants'] Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment .....	433
Supplemental Declarations in Support of Defendants' Motion for Summary Judgment.....	436
Notice of Correction of Defendants' Supplemental Declarations in Support of Defendants' Motion for Summary Judgment .....	470
Ruling of Superior Court .....	477
Opinion of the Court of Appeal, Third Appellate District .....	480
Reply Brief on the Merits of Defendants/Respondents/Appellees.....	537
Opinion of the California Supreme Court .....	556

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY

ROBERT S. THOMPSON

DENNIS M. PERLUSS

LAURIE D. ZELON

MARY E. HEALY

700 South Flower Street

Sixteenth Floor

Los Angeles, California 90017-4286

(213) 629-4200

HERBERT M. ROSENTHAL

TRUITT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

555 Franklin Street

San Francisco, California 94102-4498

(415) 561-8200

Attorneys for Defendants

## SUPERIOR COURT OF CALIFORNIA

## COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	) CIV. NO. 307168
	)
Petitioners	) SUPPLEMENTAL
and Plaintiffs,	) POINTS AND
	) AUTHORITIES IN
	) SUPPORT OF
	) DEFENDANTS'
vs.	) MOTION FOR SUM-
	) MARY JUDGMENT
	) AND [DEFEN-
STATE BAR OF CALIFORNIA,	) DANTS'] MEM-
et al.,	) ORANDUM OF
	) POINTS AND
	) AUTHORITIES IN
Respondents	) OPPOSITION TO
and Defendants.	) PLAINTIFFS'
	) MOTION FOR PAR-
	) TIAL SUMMARY
	) JUDGMENT

As pointed out in Defendants' papers already on file in this proceeding, The State Bar of California is a public governmental agency of the State of California and its officers are public officials, pursuant to the provisions of the California Constitution, Article VI, §9 and the State Bar Act, Bus. & Prof. Code § 6000, et seq. More specifically it is a public corporation in the judicial branch of government. (See Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, p. 7/19-24; see also Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 3/11-15.)

Following are citations to selected state and federal decisions which uphold and affirm the State Bar's lawful status as a public governmental entity:

*State Bar v. Superior Court* (1929) 207 Cal. 323, 328 and 329.

*Herron v. State Bar* (1931) 212 Cal. 196, 199.

*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 671.

*Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 565 et seq.

*Hersh v. State Bar* (1972) 7 Cal.3d 241, 243.

*Criminal Courts Bar Assn. v. State Bar* (1972) 22 Cal.App.3d 681, 683.

*The State Bar of California, Employer, and Service Employees International Union, Local 250, AFL-CIO*, Petitioner, NLRB No. 20-RC-14885, Order Dismissing Petition, October 5, 1979.

*Silverton v. Department of the Treasury, et al.* (1978) 449 F.Supp. 1004, 1006; affd. (1981) 644 F.2d 1341, 1344.

*Engel v. McCloskey* (1979) 92 Cal. App. 3d 870, 881 and 886.

Dated: December 29, 1983

Respectfully submitted,

HUFSTEDLER, MILLER, CARLSON &  
BEARDSLEY

ROBERT S. THOMPSON

DENNIS M. PERLUSS

LAURIE D. ZELON

MARY E. HEALY

and

HERBERT M. ROSENTHAL

TRUITT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

By /s/ Magdalene Y. O'Rourke  
Magdalene Y. O'Rourke

Attorneys for Defendants

---



HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
 ROBERT S. THOMPSON  
 DENNIS M. PERLUSS  
 LAURIE D. ZELON  
 MARY E. HEALY  
 700 South Flower Street  
 16th Floor  
 Los Angeles, California 90017-4286  
 (213) 629-4200

HERBERT M. ROSENTHAL  
 TRUITT A. RICHEY, JR.  
 MAGDALENE Y. O'ROURKE  
 555 Franklin Street  
 San Francisco, California 94102-4498  
 (415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO.
	)	307168
Petitioners	)	
and Plaintiffs,	)	SUPPLEMENTAL
	)	DECLARATIONS
vs.	)	IN SUPPORT OF
	)	DEFENDANTS'
STATE BAR OF	)	MOTION FOR
CALIFORNIA,	)	SUMMARY
et al.,	)	JUDGMENT
	)	
Respondents	)	
and Defendants.	)	
	)	

As demonstrated by the entire record herein, it is Defendants' positions that:

1. the State Bar is an agency of the California state government created by Article VI, §9 of the California Constitution and implementing legislation;

2. because the State Bar is an agency of government it has all powers expressly or implicitly granted it by the Constitution and statute, limited only by restrictions imposed by the Constitution;

3. each category of State Bar activity and each specific activity of the State Bar mentioned in the complaint is expressly or implicitly authorized by the California Constitution and the State Bar Act. This authorization is confirmed annually by the Legislature in enacting legislation providing for financing the State Bar after receiving the agency's proposed budget for the ensuing year;

4. no constitutional restriction precludes the State Bar from engaging in the categories of activity described in the complaint or the specific functions mentioned in it. To the contrary, two decisions of the United States Supreme court issued since the complaint was filed reject the constitutional attack mounted by plaintiffs.

The attached declarations are submitted to augment the record in support of Defendants' positions. The declaration by Truitt A. Richey (Exhibit A) describes State Bar activities as amicus curiae and sets forth the basis for State Bar participation as amicus curiae. The three declarations by Mary G. Wailes (Exhibits B, C and D) describe legislative oversight of State Bar activities and the

HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street - 16th Floor  
Los Angeles, California 90017-4286  
Telephone: (213) 629-4200

Bar of California, and since early 1979 I have been one of two chief assistants to the General Counsel responsible for supervising the legal work of the State Bar Office of General Counsel. Part of my responsibilities in that position have been supervising the presentation of requests for State Bar amicus curiae participation to the appropriate committee of the Board of Governors and to the Board. If State Bar amicus curiae participation should be authorized by the Board of Governors, my responsibilities also include the preparation and filing or the supervision of such preparation and filing of most State Bar amicus briefs. I am familiar with the practices and procedures of the State Bar relating to State Bar amicus curiae participation, and I am familiar with State Bar amicus curiae participation since 1977.

3. State Bar participation as amicus curiae has in most instances followed authorization by the Board of Governors after affirmative recommendation by an appropriate Board committee. (The two exceptions since 1977 have involved instances where it was necessary to inform a court of State Bar rules and their administrative interpretation, and there was inadequate time to go to the Board.) It is my observation that this participation has been limited to issues basic to the State Bar, e.g., validity and interpretation of the State Bar Act or State Bar rules; validity and interpretation of legislation that the State Bar has sponsored; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships.

4. Although there are exceptions, State Bar amicus curiae participation is normally authorized only at the

appellate level, and generally only in the highest court where an issue is likely to be determined.

5. In May 1981, the Board of Governors formally adopted Procedures for State Bar for State Bar Amicus Curiae Participation. A copy is attached as Appendix A and indicated herein by reference. These procedures are consistent with the previously long-standing but informal procedures followed by the Board when considering State Bar amicus curiae participation. Section 3 of these Procedures sets forth the standards used by Counsel for the State Bar and by the Board of Governors in determining what is an appropriate case for State Bar amicus curiae participation.

6. Set forth below is a brief description of the matters in which the State Bar has participated as amicus curiae since January 1977. Each matter is one of public record and is subject to judicial notice pursuant to Evidence Code section 452(d). The description contains the name of the matter, the name of the court in which the matter took place, the appropriate court record number, and a short summary of the issue argued by the State Bar.

#### 1977

1. *Court of Appeal v. Superior Court (Spelio)* (Cal. Supreme Court, No. L.A. 30648; following decision in Los Angeles County Superior Court) - How admission and disciplinary authority of the Supreme Court and like responsibilities of the State Bar under the State Bar Act were affected by legislation that compelled destruction of records relating to conviction for certain drug offenses.



2. *Bates & Osteen v. Arizona State Bar* (U.S. Supreme Court, No. 76-316; following decision of Supreme Court of Arizona) -

Validity of lawyer advertising rules (such as the then extent State Bar Rules of Professional Conduct).

3. *Hayes v. Wood* (Cal. Supreme Court, No. S.F. 23830; following decision in Court of Appeal and Mendocino County Superior Court)\* -

Compatibility of Fair Political Practices Act requirements re disclosure of certain information with lawyers' obligations under oath and duties provision of the State Bar Act not to disclose secrets of clients; the impact on client confidences; the attorney-client relationship, and the equal protection problem arising from the act setting forth a lower client fee reporting threshold for lawyer public officials.

4. *Comden v. Superior Court* (Cal. Supreme Court, L.A. No. 30787; following decision of Los Angeles County Superior Court) -

Meaning of rule 2-111(A)(4) of the State Bar Rules of Professional Conduct.

5. *People v. Skyhorse & Mohawk* (Superior Court of Santa Barbara County, No. CR 10965\*\* -

\* Amicus curiae appearances were authorized in the lower courts.

\*\* This involved a unique situation where the State Bar was allegedly improperly identified with the local bar's actions.

Motion for change of venue following actions by local bar association that allegedly prevented fair trial.

6. *Merco Construction Co. v. Long Beach Municipal Court* (Cal. Supreme Court, No. L.A. 30825; following decision by Court of Appeal and Los Angeles County Superior Court) -

Was legislation permitting non-lawyers to appear in municipal court compatible with unauthorized practice of law, admission and discipline provisions of the State Bar Act, and the Supreme Court's inherent power to control practice of law?

7. *Ohralik v. Ohio State Bar Association* (U.S. Supreme Court, No. 76-1650; following decision of Supreme Court of Ohio) -

Was there a constitutional right for lawyers to solicit clients? (The decision would affect provisions of the State Bar Act and State Bar Rules of Professional Conduct pertaining to solicitation of clients by lawyers.)

8. *In the Matter of Edna Smith* (U.S. Supreme Court, No. 77-56; following decision of North Carolina Supreme Court) -

Was there a constitutional right for lawyers to solicit clients? (The decision would affect provisions of the State Bar Act and State Bar Rules of Professional Conduct pertaining to solicitation of clients by lawyers.)

9. *In re Sugar Litigation* (U.S. Dist. Court, No. Dist. of California, MDL No. 201 GHB)\* -

Validity under State Bar Act and Rules of Professional Conduct of non-lawyers soliciting assignments of antitrust causes of action and providing legal representation on the basis of 50% contingent fee contracts.

1978

1. *People v. Perez* (Cal. Supreme Court, Crim. No. 20630; after decision of Court of Appeal) -

Validity of State Bar Rules Governing the Practical Training of Law Students.

2. *Bauguess v. Paine* (Cal. Supreme Court, No. S.F. 23764; after decision of Court of Appeal) -

The effect on the administration of justice and attorney-client relationships if a trial court were held, in the absence of statute, to have authority to award attorneys' fees to one party as sanctions for the misconduct of the attorney for the other party.

3. *People v. Bolton* (Cal. Supreme Court, Crim. No. 20294; after decision by Court of Appeal) -

Should a trial or appellate court, when it finds attorney misconduct in a proceeding before it, automatically forward its findings or opinion to the State Bar?

\* Amicus curiae appearances were authorized in the lower courts.

4. *Van Atta v. Scott* (Cal. Supreme Court, No. S.F. 23946; after decision in the Court of Appeal) -

The Court was informed as to the studies concerning bail and own recognition conducted by the State Bar over the years and its work with the legislature, and was requested to clarify constitutional standards to guide further legislative efforts.

1979

1. *Barron v. Nigro* (U.S. Dist. Court, So. Dist. of California, No. 78-0448-E)\* -

Confidentiality of State Bar admission proceedings and immunity from liability of persons who report misconduct of bar applicants to the State Bar.

2. *Wilner v. Superior Court* (Cal. Court of Appeal, 2nd Civ. No. 55829; after decision by the Ventura County Superior Court) -

The nature of the duty of a lawyer under the oath and duties provisions of the State Bar Act to keep a client's files secret, and the extent to which those files are protected by the attorney-client privilege from disclosure in discovery proceedings to which the attorney and not the client is a party.

3. *Deukmejian v. Superior Court* (Cal. Court of Appeal, 2nd Civ. No. 55977; after decision by Los Angeles County Superior Court) -

\* Amicus appearance authorized in lower court.

The nature of the duty of a lawyer under the oath and duties provisions of the State Bar Act to keep secret a client's files and the extent to which a client's files are protected by the attorney-client privilege from disclosure when the office of the attorney is the subject of a search pursuant to a search warrant.

4. *Keefer v. Giovanazi* (Sacramento Superior Court, No. 28334)\* -

Confidentiality of complaints to the State Bar.

5. *Woodland Hills Res. Assoc. v. City Council of Los Angeles* (Supreme Court, No. L.A. 31133; after decision by Court of Appeal) -

Do campaign contributions, per se, by attorneys and their clients to judges constitute sufficient cause for recusal if the contributing attorney or his client appear in a matter before the judge?

1980

1. *Hustedt v. Workers Comp.* (Supreme Court, No. L.A. 31384; after decision of the Court of Appeal; petition for writ of prohibition against Workers Compensation Appeals Board)\*\* -

Validity of labor code provision authorizing Workers Compensation Appeals Board to remove right of attorneys to appear before it in light of the inherent

\* Participation was at trial court level to protect confidentiality of State Bar disciplinary records.

\*\* State Bar participation was requested by Court of Appeal and began in that court.

and exclusive power of the Supreme court and provisions of the State Bar Act for admission and discipline of attorneys.

2. *Mandel v. Myers* (Cal. Supreme Court, No. S.F. 24217; after decision of the Court of Appeal) -

Award of attorneys fees pursuant to Code of Civil Procedure section 1021.5, a statute formulated and sponsored by The State Bar of California.

1981

1. *Bryan v. Superior Court of Santa Cruz* (Court of Appeal, 1 Civ. No. 51416)

Confidentiality of disciplinary complaints to the State Bar. -

1982

1. *Brosnahan v. Brown*, No. S.F. 24441 (Supreme Court assumed jurisdiction before matter was heard by Court of Appeal) -

State Bar argued that Proposition 8's unconstitutional repeal and modification of significant portions of the California Evidence Code, which was jointly drafted by the California Law Revision Commission and the State Bar, would seriously affect California lawyers and administration of justice in California.

1983

1. *In the Matter of Sturghall on Habeas Corpus* (Cal. Supreme Court, Crim. No. 22508; State Bar amicus participation at the request of the Supreme Court) -



In light of Business and Professions Code 6007, may or must a trial judge remove counsel for a criminal defendant on the grounds that the attorney is unable, as a result of mental illness, to afford constitutionally adequate representation.

2. *Stanwyck v. Horne* (Court of Appeal, 2nd Dist., 2 Civ. No. 65657) -

Immunity of complaining witness and witness in State Bar disciplinary proceeding to an action for malicious prosecution brought following dismissal of the disciplinary proceeding.

3. *California Association of Collectors v. Hyatt, Hyatt & Landau* (Los Angeles County Superior Court, No. C296847)\* -

Position of State Bar as to its authority and authority of Supreme Court to hold an attorney responsible for conduct of his or her lay employees; authority of Collection Agency Licensing Bureau to require attorneys to hold collection agency licenses.

4. *Mowrer v. Superior Court* (Court of Appeal, 2nd Dist., 2nd Civ. No. 68838; State Bar amicus participation requested by court) -

Does trial court have inherent power to fix compensation of counsel appointed pursuant to *Salas v. Cortez* (1979) 24 Cal.3d 22, and, if not, what factors

\* Amicus participation authorized in lower court.

should court consider in selecting counsel to appoint? State Bar interim studies forwarded to the Court of Appeal.

5. *Toussaint v. Yokey* (U.S. Court of Appeal, Ninth Cir., Nos. 83-1678, 83-1775) -

Extent to which incarceration in California prison system might be a violation of Eighth Amendment to United States constitution, and thereby affect California lawyers and the administration of justice in this state. (Over the past 30 years the State Bar has studied California prisons and made numerous recommendations concerning them. These were communicated to the Court of Appeal.)

6. *Ellis v. Brotherhood of Railway Employees, et al.* (U.S. Supreme Court No. 82-1150) -

Invite the court's attention to difference between bars and labor unions, and seek to have the court confine its decision to labor unions so that the different issues involved in the unified bar context may be decided directly on the merits by the court.

7. *Hoover v. Ronwin* (U.S. Supreme Court No. 82-1474) -

Application of the state action exemption under federal antitrust laws to the activities of the Committee of Bar Examiners.

8. *Resch v. Troy* (Court of Appeal, 2nd Dist., 2nd Civ., No. 67548) -

After inquiry by Court of Appeal as to whether State Bar wished to appear as amicus curiae in a matter involving

interpretation and application of State Bar law corporation rules (see Bus. & Prof. Code, § 6171), State Bar filed an "amicus" letter setting forth long-standing State Bar administrative interpretations of the rules in question.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 3, 1984 at San Francisco, California.

/s/ Truitt A. Richey, Jr.  
Truitt A. Richey, Jr.

#### APPENDIX A

##### PROCEDURES FOR STATE BAR AMICUS CURIAE PARTICIPATION

###### SECTION 1. APPLICATION.

This article applies to all requests for State Bar participation in litigation as an amicus curiae, except the requests by General Counsel to support State Bar positions in pending or prospective litigation or protect activities or proceedings conducted by the State Bar. A request for State Bar participation in litigation as an amicus curiae includes any request which would require that the State Bar file or submit any pleading, in letter or other form, with a court in a pending matter, whether in support of a party or otherwise, and whether on the merits, jurisdiction or otherwise.

###### SECTION 2. AUTHORIZATION.

State Bar participation in litigation as an amicus curiae is subject to authorization by the Board of Governors following an affirmative recommendation by Board Committee.

###### SECTION 3. APPROPRIATE CASES.

The State Bar is a Judicial Branch agency and should not ordinarily take a partisan position in another's lawsuit. State Bar amicus curiae participation is thus extremely limited and necessarily involves issues basic to the State Bar as, for examples, validity and interpretation of the State Bar Act or State Bar Rules; validity and interpretation of State Bar-sponsored legislation; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships. It is also recognized that the State Bar amicus curiae participation will have greater impact on the courts if used sparingly.

Additionally, amicus curiae participation is authorized only as follows:

- (a) At the appellate level, and generally only in the highest court where an issue is likely to be determined.
- (b) When one or more significant legal questions are involved and a State Bar amicus curiae pleading would constitute a significant contribution to the determination of those questions.
- (c) The position sought to be advanced is consistent with previous policy of the State Bar or is a matter of compelling public interest

which the Board of Governors then adopts as policy of the State Bar consistent with its due charge. Where the pleading *amicus curiae* would not support a previous policy of the State Bar, the Board of Governors shall first determine whether the position sought to be advanced ought to be the policy of the State Bar; and the Board will make a determination of whether the policy position of the State Bar should be advanced in that particular case through a pleading *amicus curiae*.

- (d) The Court may consider the opinion of the State Bar on the matter in question to be enlightening and persuasive.
- (e) The resolution of the issue before the particular court involved will have an impact upon the development of the law.
- (f) The filing of the pleading is feasible, including timing, availability of counsel and expenses.
- (g) The filing of any pleading on behalf of the State Bar will be in compliance with the governing rules of court.

#### SECTION 4. PROCEDURES

- A. Any person or entity, including any component part of the State Bar, requesting State Bar participation as an *amicus curiae* in litigation shall file an application and three copies thereof with the Secretary in the San Francisco office of the State Bar. The Secretary shall furnish the General Counsel one copy of the application and all accompanying documents for review and shall furnish copies of the application and shall invite comment from State Bar components which the Secretary shall deem to have an appropriate interest and which have not been

previously furnished the application by the requestor.

When the application is calendared for Board Committee and, in turn, Board consideration, it shall be an open agenda item unless General counsel certifies that the matters to be discussed will (a) fall within the categories of matters specified in the lettered subdivisions of section 6026.5 of the Business and Professions Code; (b) fall within the attorney-client privilege, or are otherwise privileged from disclosure; or (c) involve information received or held by the State Bar that is protected by the California constitutional guarantee of privacy.

- B. In order to make a well-reasoned decision as to whether *amicus curiae* participation should be undertaken by the State Bar, the Board Committee having jurisdiction and, in turn, the Board of Governors, should be fully informed by the requestor as to the following application:
  - (1) The name of the case, including the name and location of the court in which the pleading would be filed.
  - (2) The names of the parties and their counsel and the names of all the known or anticipated *amicus curiae* and their counsel.
  - (3) The name, address and phone number of the person making the request, along with those of the person(s) or entity(ies) on whose behalf the request is being made, should be set forth.
  - (4) A designation of whether the requestor is a party in the litigation should be made. If not a party, the nature of the relationship between the requestor



applying and the parties of the litigation, as well as the requestor's substantive concern with the issues being litigated, should be stated. If not a party, the requestor must indicate whether the party on whose behalf the State Bar is to intervene knows and consents to the State Bar's being asked to participate as *amicus curiae*.

- (5) If the court in which the litigation is pending is not designated as either the United States or California Supreme Courts, the requestor must state compelling reasons why the State Bar should join in at another stage of litigation in spite of its general policy to refrain from so doing.
- (6) A statement of the principle of law or legal points to be supported, with a full explanation of the applicant's reasons for believing that the case is an appropriate one for State Bar involvement and why there is a necessity for additional argument on the law or legal points specified.
- (7) A statement of the undisputed and disputed facts in the case, including present status of the litigation.
- (8) A statement or full disclosure of any professional or personal interest in the matter of any proponent of the application.
- (9) The date by which the pleading must be filed.
- (10) A statement relating significant contributions it is believed the State Bar might make by filing a pleading in the particular case.

Appropriate and relevant pleadings, court decisions and orders entered in the case should also be submitted along with the application. The requestor must supply the State Bar with the record of the case, including past opinions and pleadings, to the extent possible at the time the request is made. The requestor will be charged with supplying the State Bar with additions to the record until a decision on whether to file the *amicus* pleading is made.

- C. The requestor must approach the State Bar for its support as soon as possible after the record or pleadings are filed in the court in which the litigation is then pending. If the time to respond to the request is insufficient to allow the State Bar to make an independent evaluation of the record and the strengths and weaknesses of the position which it is being encouraged to take, the State Bar may refuse to consider the request in the first instance.
- D. The requestor should understand that the State Bar may invite comment from appropriate State Bar committees and sections and interested parties prior to final Board action; that the State Bar is not precluded from taking *any* position on the issues presented by the litigation, even one or more which might be contrary to the one of the requestor, and that approval by the State Bar Board of Governors is required for *amicus* filings and would be conditioned on the Board's decision to become, or even remain, involved.
- E. Normally, if *amicus curiae* is authorized, the appearance shall be made by General Counsel or under General Counsel's direction. In other instances, the pleading will only be filed following the approval of General Counsel as to form and consistency with State Bar

positions, policies, practices, rules and regulations.

EXHIBIT B

HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street  
16th Floor  
Los Angeles, California 90017-4286  
(213) 629-4200

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, California 94102-4498  
(415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO. 307168
Petitioners	)	DECLARATION
and Plaintiffs,	)	OF MARY G.
vs.	)	WAILES RE LEG-
STATE BAR OF CALIFORNIA,	)	ISLATIVE OVER-
et al.,	)	SIGHT IN
Respondents	)	SUPPORT OF
and Defendants.	)	DEFENDANTS'
	)	MOTION FOR
	)	SUMMARY
	)	JUDGMENT

STATE OF CALIFORNIA )  
 ) ss.  
CITY AND COUNTY OF SAN FRANCISCO )

MARY G. WAILES declares:

1. I am and, since June 12, 1951, continuously have been an active member of The State Bar of California. I have been continuously in the employ of The State Bar of California as an attorney since October 16, 1961.

2. I was appointed as an Assistant Secretary of the State Bar effective July 29, 1970, and was first elected Secretary of the State Bar effective June 1, 1978. I have subsequently been re-elected Secretary each year since 1978 and presently hold that office.

3. Since September 1970, I have been responsible for preparing and arranging the agenda for all meetings of the Board of Governors. I attend all meetings of the Board and prepare the minutes of its meetings and am responsible for advising appropriate persons and entities of the Board's actions and assuring that its directives are executed.

4. I am custodian of the records of the State Bar and supervise and maintenance of the files and records of the Board of Governors and the agenda, agenda materials, action summaries and inventories of committees of the Board of Governors.

5. As an officer of the State Bar and as custodian of State Bar records, I am familiar with the ongoing oversight and review of State Bar activities and programs by the California State Legislature in the process of enacting State Bar fee bills. Some examples of means by which the

Legislature has in recent years scrutinized the State Bar, its programs, activities, and procedures are described below.

6. Between 1979 and 1983, each fee bill enacted by the Legislature has provided for fees for single-year periods only, rather than for multiple-year periods. It has, therefore, been necessary to enact a fee bill annually. Each year when the bill is considered, the entire range and scope of State Bar activity is called into question. All categories of State Bar activities and functions are the subject of extensive inquiry and debate by the Senate and Assembly Judiciary Committees and on the floor of the Senate and Assembly. Witnesses are heard and the State Bar submits to the Legislature very detailed documents describing all categories of State Bar activity. (See The State Bar of California 1982 Fee Bill Planning Materials, March 20, 1981, attached as Exhibit 1 to Defendant's Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.) Throughout each Legislative session, the State Bar responds in writing to numerous inquiries about its programs and activities from the Legislature.

7. In addition to the annual Legislative scrutiny in the process of enacting the fee bill, other oversight has been expressly mandated by the Legislature.

8. In 1974 at the request of the Legislature, the Auditor General of the State of California began an exhaustive review and study of the functioning, programs, and fees of the State Bar. The Auditor General's first report to the legislature was transmitted July 2, 1974. The Auditor General continued on-site review and study

of the State Bar through 1977 and reported to the Legislature throughout that period. As a result of the study and reports, throughout the period, the Legislature addressed numerous detailed inquiries to the State Bar and from time to time requested that the State Bar inform the Legislature of actions taken to implement recommendations included in the reports.

9. In 1979 the Legislature created by statute a special Legislative Investigating Committee on the State Bar "to review and make recommendations regarding the scope, efficacy, and economy of the State Bar's activities." This Committee continued its work until January 1982. During that period the Special Committee engaged in ongoing comprehensive investigation and review of the State Bar, its activities and programs.

10. Also in 1979, the Office of the Legislative Analyst was directed by Resolution Chapter 44, Statutes of 1979 (SCR 30) to make a comprehensive study of the State Bar and prepare a report based on that study. An in-depth on-site study was conducted during 1979 and early 1980 which resulted in a ninety-seven page report published March 1980. On March 11, 1980 a hearing on the Report was held before the Special Legislative Investigating Committee on the State Bar. The report was considered in connection with enactment of S.B. 1674, the 1980 fee bill.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on January 3, 1984, at San Francisco, California.

/s/ Mary G. Wailes  
Mary G. Wailes



## EXHIBIT C

HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
 ROBERT S. THOMPSON  
 DENNIS M. PERLUSS  
 LAURIE D. ZELON  
 MARY E. HEALY  
 700 South Flower Street  
 16th Floor  
 Los Angeles, California 90017-4286  
 (213) 629-4200

HERBERT M. ROSENTHAL  
 TRUITT A. RICHEY, JR.  
 MAGDALENE Y. O'ROURKE  
 555 Franklin Street  
 San Francisco, California 94102-4498  
 (415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO. 307168
Petitioners	)	DECLARATION
and Plaintiffs,	)	OF MARY G.
vs.	)	WAILES IN SUP-
STATE BAR OF CALIFORNIA,	)	PORT OF DEFEN-
et al.,	)	DANTS' MOTION
Respondents	)	FOR SUMMARY
and Defendants.	)	JUDGMENT
	)	
	)	

STATE OF CALIFORNIA	)
	) ss.
CITY AND COUNTY OF SAN FRANCISCO	)

MARY G. WAILES declares:

1. I am and, since June 11, 1951, continuously have been an active member of The State Bar of California. I have been continuously in the employ of The State Bar of California as an attorney since October 16, 1961.

2. I was appointed an Assistant Secretary of the State Bar effective July 19, 1970, and was elected Secretary of the State Bar effective June 1, 1978.

3. Since September 1970, I have been responsible for preparing and arranging the agenda for all meetings of the Board of Governors. I attend all meetings of the Board and prepare the minutes of its meetings and am responsible for advising appropriate persons and entities of the Board's actions and assuring that its directives are executed.

4. I am custodian of the records of the State Bar and supervise the maintenance of the files and records of the Board of Governors and the agenda, agenda materials, action summaries and inventories of Board of Governors committees.

5. As an officer of the State Bar and as custodian of records, I am familiar with the mechanisms and procedures built into the operational structure of the State Bar, as mandated by statute and by action of the Board of Governors, to assure wide dissemination of information about State Bar activities and to assure that all members of the State Bar have maximum opportunity to participate in the governance of the State Bar.

6. The Board of Governors is the executive body of the State Bar. Its powers and duties are conferred by

statute. Among other things, it is charged with the enforcement of the provisions of the State Bar Act. It may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice.

7. The composition of the Board is prescribed by statute. It consists of twenty-two persons, sixteen of whom are active members of the State Bar and six of whom are members of the public who have never been admitted to practice before any United States court.

8. The method of selection of Board members is prescribed by statute. Fifteen of the sixteen attorney members of the Board are nominated and elected for three-year terms by active members of the State Bar as representatives of local State Bar districts fixed by the Legislature. The sixteenth attorney is elected from the membership of the California Young Lawyers Association for a one-year term by the Board Directors of that organization. The California Young Lawyers Association (CYLA) consists of all members of the State Bar who are 36 years old or under or who have been admitted to practice law less than six years. Members of the CYLA Board are elected by district by the membership of the CYLA. Four of the six public members of the Board are appointed by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly. All six appointments are subject to confirmation by the Senate. Public members serve three-year terms.

9. In addition to an annual meeting, the Board of Governors holds two-day meetings each month at various locations throughout the state. All matters, except those

limited few matters specified by statute to be considered in closed session (Bus. & Prof. Code, § 6026.5), are deliberated and acted upon in open session.

10. To facilitate its work, the Board is divided into several committees. The Board committees report and make recommendations to the full Board after review, study, and debate of matters being considered. In order to permit all Board members and other interested parties sufficient time to become fully informed of issues involved in matters under consideration final deliberation and action by the full board normally takes place at least one month after committee report and recommendation. Interested parties have the opportunity to express their points of view orally or in writing on matters being considered by committees and the full Board. With few exceptions, most matters are considered and acted upon by Board committees in open session.

11. Each month, when agenda materials for the Board and its committees are completed, the Office of Communications prepares a press release covering the items that will be on the Board committee and Board agendas for that month. Copies of the Press release agendas and agenda materials (or some combination of these materials (or some combination of these materials as is appropriate) are sent to the study committees and sections of the State Bar, the Executive Committee of the Conference of Delegates, Board of Directors of the California Young Lawyers Association, all local bar associations and the press. Distribution to the press includes large general circulation newspapers, legal daily newspapers, minority and specialty papers, wire services, television stations and radio stations. (See Appendix A attached hereto and incorporated by reference.) The

Office of Communications receives follow up inquiries from reporters and refers them to the appropriate person to answer agenda-related questions.

12. Immediately after a meeting of the Board, the Office of Communications issues a press release on the actions of the Board. The distribution includes the press referred to in paragraph 11 above. The release is also published in *California Lawyer*, the State Bar magazine which is distributed to all members the bar, and *Cal Bar View*, a monthly publication distributed to approximately 2,000 bar leaders, e.g., local bar presidents. Special press releases and notices are prepared for Board actions that request comments from members of the bar, such as proposed Rules of Professional Conduct, before the Board takes final action.

13. The procedures governing Board and Board committee agendas and the processing of items for Board committee and Board consideration, including the matters generally objected to in the instant suit, are long-standing and of judicial notice. The meetings of the Board and Board committees are published regularly. Prior to the commencement of each Board year, a calendar of all such meetings is available. This declarant receives requests for the calendar, individual agendas and agenda items from time to time throughout a Board year from members of the State Bar, the media members of the public and public officials.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 3rd day of January, 1984, at San Francisco, California.

/s/ Mary G. Wailes  
Mary G. Wailes

## EXHIBIT D

HUFSTEDLER, MILLER, CARLSON & BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street  
16th Floor  
Los Angeles, California 90017-4286  
(213) 629-4200

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, California 94102-4498  
(415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO. 307168
Petitioners	)	DECLARATION
and Plaintiffs,	)	OF MARY G.
vs.	)	WAILES IN SUP-
STATE OF CALIFORNIA, et al.,	)	PORT OF DEFEN-
Respondents	)	DANTS' MOTION
and Defendants.	)	FOR SUMMARY
	)	JUDGMENT
	)	
	)	
STATE OF CALIFORNIA	)	
	)	ss.
CITY AND COUNTY OF SAN FRANCISCO	)	



MARY G. WAILES declares:

1. I am and, since June 12, 1951, continuously have been an active member of The State Bar of California. I have been continuously in the employ of The State Bar of California as an attorney since October 16, 1961.

2. I was appointed an Assistant Secretary of the State Bar effective July 29, 1970, and was first elected Secretary of the State Bar effective June 1, 1978. I have subsequently been re-elected Secretary each year since 1978 and presently hold that office.

3. Since September 1970, I have been responsible for preparing and arranging the agenda for all meetings of the Board of Governors. I attend all meetings of the Board and prepare the minutes of its meetings and am responsible for advising appropriate persons and entities of the Board's actions and assuring that its directives are executed.

4. I am custodian of the records of the State Bar and supervise the maintenance of the files and records of the Board of Governors and the agenda, agenda materials, action summaries and inventories of committees of the Board of Governors.

5. As an officer of the State Bar and as custodian of records, I am familiar with the structure of the State Bar which affords all attorneys an opportunity to participate in State Bar governance.

6. The Conference of Delegates, the committees and the sections are examples of participatory government in the affairs of the State Bar by practicing lawyers. These

are advisory bodies created to assist the Board of Governors in the furtherance of its duties and responsibilities under the State Bar Act.

7. Several thousand lawyers are involved directly in these groups. With respect to the Conference of Delegates, it acts in a representative role for more than 45,000 attorneys. The Conference involves some 115 local bar associations sending 1,300 delegates (who pay their own expenses) to debate proposals and recommendations for improving the administration of justice and the administration of the State Bar itself. Any lawyer or group of lawyers may place a resolution before the Conference, and there are procedures providing for representation by groups of lawyers who do not choose to be represented by a local bar association.

8. The thirteen sections, which are financially supported in part by the participants, deal with various fields of the law (e.g., Antitrust, Business Law, Criminal Law, Family Law and Taxation). Sections are open to all attorneys in California and have combined membership of some 30,000 (one-third of the members of the State Bar), whose participation involves their own personal expense.

9. Another 350 attorneys are actively involved in 11 study committees. Members of these committees and the executive committees of sections are chosen by the Board of Governors for diversity of practice as well as for expertise in subject areas. In order to insure that a cross-section of the profession is included in the various entities of the State Bar, the Board in June 1977 adopted a recruitment policy followed in September 1981 by an appointments

policy designed to encourage the opportunity of all members of the State Bar to participate in activities of the committees and sections. Annual selection by the Board insures a review of performance as well as rotation of membership to broader participation.

10. There are four ways that committees or sections receive matters for study--the Board of Governors, Board Committee on Legislation, Office of the Legislative Representative (for bills only), and Secretarial Referrals. By far the largest source of input to committees and sections is the Secretarial Referral (an administrative device to refer requests for studies or legislation to the appropriate committee or section). Most of these referrals are of letters from members of the State Bar requesting the State Bar to sponsor, support or oppose legislation in a particular area.

11. The Office of Communications works with committees and sections and issues press releases, places informational notices in *California Lawyer* and *Cal Bar View* on many of the studies of these groups with the view toward receiving input from the public and lawyers at large.

12. The entities discussed above are very important because most of the law reform work of the State Bar generates from and through these bodies of volunteers. Their work brings to the Legislature, the Judicial Council and the Governor the cross-section of views within the legal profession and a distillation of the objective consensus as best it can be achieved in a representative democracy. Further, it is also these entities which deal and concern themselves with improving lawyer skills and

competence through educational efforts for the benefit of lawyers, including programs for increasing efficiency and decreasing costs of operating a law practice.

13. The nature of the structure of these entities is also important because it encourages diversity among practicing lawyers participating and reduces the chances for special interest lobbying by the State Bar. That structure and the operation of these entities is the subject of detailed regulation. (See Rules and Regulations of the State Bar; State Bar Guidelines for Standing and Special Committees, Commissions and Sections; see also State Bar 1982 Conference of Delegates Handbook, attached as Exhibit 7 to Defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction; and the By-Laws of the Sections).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 3, 1984 at San Francisco, California.

---

Mary G. Wailes

---

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street  
Sixteenth Floor  
Los Angeles, California 90017-4286  
(213) 629-4200

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, California 94102-4498  
(415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO. 307168
Petitioners	)	NOTICE OF COR-
and Plaintiffs,	)	RECTION OF
vs.	)	DEFENDANTS' SUP-
STATE BAR OF CALIFORNIA,	)	PLEMENTAL DEC-
et al.,	)	LARATIONS IN
Respondents	)	SUPPORT OF
and Defendants.	)	DEFENDANTS'
	)	MOTION FOR SUM-
	)	MARY JUDGMENT
	)	Department 9

TO ALL PARTIES AND THEIR ATTORNEYS OF  
RECORD:

Defendants inadvertently failed to include in their  
"Supplemental Declarations in Support of Defendants'  
Motion for Summary Judgment" filed January 3, 1984, a

request that this Court take judicial notice of certain  
matters referred to and described in the supplemental  
declarations designated as Exhibits A and B.

The attached "Notice of Request To Take Judicial  
Notice" is respectfully submitted to correct the omission.

Also attached are corrected pages to be substituted  
for like pages on file which contain the following errors:  
the grammatical error on page 1/22-23 of the paper enti-  
tled "Supplemental Declarations in Support of Defen-  
dants' Motion for Summary Judgment is corrected; the  
code section on page 3/22 of Exhibit C, incorrectly cited  
as "6016.5" is corrected to read "6026.5"; and the spelling  
of the word "Guidelines" is corrected on page 5/2 of  
Exhibit D.

DATED: January 5, 1984.

HUFSTEDLER, MILLER, CARLSON &  
BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY

and

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE

By /s/ Magdalene Y. O'Rourke  
Magdalene Y. O'Rourke

Attorneys for Defendants



HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY

ROBERT S. THOMPSON

DENNIS M. PERLUSS

LAURIE D. ZELON

MARY E. HEALY

700 South Flower Street

Sixteenth Floor

Los Angeles, California 90017-4286

(213) 629-4200

HERBERT M. ROSENTHAL

TRUITT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

555 Franklin Street

San Francisco, California 94102-4498

(415) 561-8200

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO. 307168
	)	
Petitioners	)	NOTICE OF
and Plaintiffs,	)	REQUEST TO TAKE
	)	JUDICIAL NOTICE
vs.	)	
	)	
STATE BAR OF CALIFORNIA,	)	
et al.,	)	
	)	
Respondents	)	
and Defendants.	)	
	)	

NOTICE IS HEREBY GIVEN the Defendants, State Bar of California, Anthony M. Murray, Patricia Greene, Girt K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Louks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. David, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig

A. Silberman, Daniel J. Tobin, James D. Ward and Joon Hee Rho request that judicial notice be taken of the following matters pursuant to Evidence Code sections 452 and 453:

1. State Bar amicus curiae briefs on file in the court records of the cases described in the declaration by Truitt A. Richey, Jr., "Exhibit A" attached to Defendants' "Supplemental Declarations in Support of Defendant's Motion for Summary Judgment".

2. The official acts of the California Legislature and related matters described in the declaration by Mary G. Wailes re legislative oversight, "Exhibit B" attached to Defendants' "Supplemental Declarations in Support of Defendants' Motion for Summary Judgment".

DATED: January 5, 1984.

Respectfully submitted,

HUFSTEDLER, MILLER, CARLSON

& BEARDSLEY

ROBERT S. THOMPSON

DENNIS M. PERLUSS

LAURIE D. ZELON

MARY E. HEALY

and

HERBERT M. ROSENTHAL

TRUITT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

By /s/ Magdalene Y. O'Rourke  
Magdalene Y. O'Rourke

Attorneys for Defendants

## CORRECTED

HUFSTEDLER, MILLER, CARLSON  
& BEARDSLEY  
ROBERT S. THOMPSON  
DENNIS M. PERLUSS  
LAURIE D. ZELON  
MARY E. HEALY  
700 South Flower Street  
16th Floor  
Los Angeles, California 90017-4286  
(213) 629-4200

HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, California 94102-4498  
(415) 561-8200

*Attorneys for Defendants*

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,	)	CIV. NO. 307168
	)	
Petitioners	)	SUPPLEMENTAL
and Plaintiffs,	)	DECLARATIONS IN
	)	SUPPORT OF
vs.	)	DEFENDANTS'
	)	MOTION FOR SUM-
STATE BAR OF CALIFORNIA,	)	MARY JUDGMENT
et al.,	)	
	)	
Respondents	)	
and Defendants.	)	

As demonstrated by the entire record herein, Defendants' positions are that:

1. the State Bar is an agency of the California state government created by Article VI, §9 of the California Constitution and implementing legislation;
2. because the State Bar is an agency of government it has all powers expressly or implicitly granted it by the

[Original document skips intervening page.]

members of the State Bar and six of whom are members of the public who have never been admitted to practice before any United States court.

8. The method of selection of Board members is prescribed by statute. Fifteen of the sixteen attorney members of the Board are nominated and elected for three-year terms by active members of the State Bar as representatives of local State Bar districts fixed by the Legislature. The sixteenth attorney is elected from the membership of the California Young Lawyers Association for a one-year term by the Board Directors of that organization. The California Young Lawyers Association (CYLA) consists of all members of the State Bar who are 36 years old or under or who have been admitted to practice law less than six years. Members of the CYLA Board are elected by district by the membership of the CYLA. Four of the six public members of the Board are appointed by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly. All six appointments are subject to confirmation by the Senate. Public members serve three-year terms.

9. In addition to an annual meeting, the Board of Governors holds two-day meetings each month at various locations throughout the state. All matters, except those

limited few matters specified by statute to be considered in closed session (Bus. & Prof. Code, § 6026.5), are deliberated and acted upon in open session.

10. To facilitate its work, the Board is divided into several committees. The Board committees report and make recommendations to the full Board after review, study, and debate of matters being considered. In order to permit all Board members

[Original document skips intervening page.]

and other interested parties sufficient time to become fully informed of entities is the subject of detailed regulation. (See Rules and Regulations of the State Bar; State Bar Guidelines for Standing and Special Committees, Commissions and Sections; see also State Bar 1982 Conference of Delegates Handbook, attached as Exhibit 7 to Defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction; and the By-Laws of the Sections).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 3, 1984 at San Francisco, California.

/s/ Mary G. Wailes  
Mary G. Wailes

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE  
COUNTY OF SACRAMENTO

DATE MAR. 19, 1984, COURT MET AT ---  
DEPARTMENT 9

PRESENT HON, HORACE E. CECCHETTINI, JUDGE  
T.K. RIVERA DEPUTY CLERK

\_\_\_ REPORTER \_\_\_ BAILIFF

EDDIE KELLER, et al.

COUNSEL:

vs

ANTHONY T. CASO

STATE BAR OF  
CALIFORNIA, et al.

HERBERT M. ROSENTHAL  
ROBERT S. THOMPSON

(Underline counsel present)

NATURE OF PROCEEDINGS: DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT, OR, IN ALTERNATIVE,  
FOR SUMMARY ADJUDICATION OF ISSUES,  
OR FOR JUDGMENT ON THE PLEADINGS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT

COURT'S RULINGS

On October 25, 1982, four Plaintiffs filed the complaint herein against the State Bar of California and its Board of Governors seeking injunctive relief, mandate, declaratory relief and partial recovery of monies paid by way of dues. On November 18, 1982, and January 14, 1983, amendments adding additional plaintiffs were filed. The original answer was filed on January 21, 1983, and an amended answer on March 29, 1983, each admitting some



factual allegations but denying Plaintiffs' claims. A demurrer to the third affirmative defense was sustained without leave to amend. The motion for a preliminary injunction was denied on March 4, 1983.

On November 22, 1983, Defendants moved for summary judgment with alternative requests for summary adjudication and judgment on the pleadings. Plaintiffs filed a motion for "Partial Summary Judgment" on November 23, 1983.

While urging different theories, the complaint herein essentially alleges that Plaintiffs are required to be members of the defendant State Bar Association, which is administered by the individual Defendants; that the State Bar collects dues from them, but uses part of the monies for political and ideological causes in violation of Plaintiffs' First Amendment rights; that Plaintiffs disagree with the espoused causes; and that the individual Defendants are allegedly liable for return of certain monies used to promulgate the same.

The State Bar is a governmental agency authorized to do the acts which Plaintiffs find objectionable. Express constitutional or statutory sanction does not exist for each of said activities, but by necessary implication that result must be reached. The First Amendment is no bar to these activities, and it is clear that the State Bar acts strictly within the laws and rules which safeguard the participatorial rights of all members. Moreover, Plaintiffs failed to show that the Board member Defendants did not use "due care" within the standards set forth in *Stanson v. Mott*; 17 Cal.3d 206. The evidence is that they acted in good faith. Under these circumstances, there is no triable

issue, and the motion for summary judgment by all defendants is granted. The motion by Plaintiffs is denied. The Court overrules the evidentiary and other objections by Plaintiffs.

cc-mailed to each above named counsel this date

BOOK 9

MINUTES

PAGE 795

JOYCE RUSSELL SMITH,  
CLERK

CC 1b

ACTION NO. 307168

By /s/ T.K. Rivera Deputy

---

CERTIFIED FOR PUBLICATION  
C O P Y  
IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA  
THE THIRD APPELLATE DISTRICT  
(Sacramento)

EDDIE KELLER, et al.,	)	3 Civ. 24124
Plaintiffs and Appellants,	)	(Super.Ct.No. 307168)
v.	)	(Filed May 23, 1986)
STATE BAR OF CALIFORNIA,	)	
et al.,	)	
Defendants and Respondents.	)	

APPEAL from a judgment of the Superior Court of Sacramento County. Horace E. Cecchettini, Judge. Reversed with directions.

Ronald A. Zumbrun, John H. Findley and Anthony T. Caso for Plaintiffs and Appellants.

Hufstedler, Miller, Carlson & Beardsley, Robert S. Thompson, Laurie D. Zelon and Mary E. Healy; Herbert M. Rosenthal, Truitt A. Richey, Jr. and Magdalene Y. O'Rourke, for Defendants and Respondents.

"The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." (Cal. Const., art VI, § 9.) Under pain of criminal punishment, no person may practice law in California unless he is an active member of the State Bar. (Bus. & Prof. Code,

§§ 6125-6126.)<sup>1</sup> The Board of Governors of the State Bar, upon authorization from the Legislature, fixes and imposes an annual membership fee upon members of the State Bar, (§ 6140.) The fees are paid into the treasury of the State Bar, and become part of its funds. (§ 6144.) Plaintiffs are licensed attorneys and members of the State Bar. They assert that the State Bar and its Board of Governors utilize their compelled membership fees to promote political and ideological positions contrary to their beliefs and in violation of their First Amendment rights. The trial court granted summary judgment in favor of the State Bar and the members of the Board of Governors. The plaintiffs appeal.

The decisions of the United States Supreme Court "establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." (*Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 233 [52 L.Ed.2d 261, 283].) "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." (*Id.*, at pp. 234-235 [52 L.Ed.2d at p. 284]; citations and fns. omitted.) Those principles, the *Abood* court concluded, prohibited a school board

<sup>1</sup> All further statutory references are to the Business and Professions Code unless otherwise indicated.

from requiring teachers, as a condition of holding a job in a public school, to contribute to the union for the support of political and ideological causes which they opposed and which were unrelated to collective bargaining. (*Id.*, at pp. 235-236.) These same First Amendment principles prohibit the State Bar from requiring its members, as a condition of practicing law, to contribute to the support of political or ideological causes they oppose and which are not germane to the purposes of the State Bar Act.

As we shall demonstrate, the State Bar has no constitutional or legislative authority to engage in purely political or ideological activities unrelated to its statutory purposes. Its powers are limited to what we will call its regulatory and administration of justice functions. The State Bar is free to act and speak on matters germane to these functions. It may also engage in conduct germane to its purposes even though that conduct has political or ideological ramifications so long as that activity does not impose additional infringements upon First Amendment rights not justified by a compelling governmental interest. But when the State Bar acts beyond these legitimate functions, we agree with plaintiffs that its members may not be constitutionally compelled to support political and ideological positions with which they disagree through compelled membership fees as the condition of the right to practice law. Since defendants have failed to establish that there are no triable issues concerning the constitutional and statutory legitimacy of the challenged conduct, we shall reverse the judgment and remand for further proceedings.

## I

This litigation commenced when four of the plaintiffs filed a petition for a writ of mandate and complaint for declaratory and injunctive relief against the State Bar and the members of the State Bar Board of Governors. Plaintiffs allege that the State Bar, by and through the Board of Governors, has expended and will continue to expend substantial portions of the revenues derived through mandatory membership fees to advance political and ideological causes, including, but not limited to: (1) lobbying the California Legislature; (2) submitting amicus curiae briefs in cases taking positions in direct opposition to those held by some of its members; (3) financing meetings of the Conference of Delegates at which political and ideological causes are advanced; (4) publicizing the political and ideological speeches of its then president, Anthony Murray; and (5) financing a so-called public information project designed to disseminate to the general public a particular ideology regarding judicial retention elections. Plaintiffs further allege that they do not subscribe to many of the political and ideological beliefs advanced, and that they object to the use of their mandatory dues to further any such beliefs. Plaintiffs assert that to compel them to provide financial support for the advancement of any political and ideological beliefs, particularly those with which they disagree, violates their constitutional rights of freedom of speech and association, as guaranteed by the First and Fourteenth Amendments of the United States Constitution.<sup>2</sup> Plaintiffs

<sup>2</sup> The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging

(Continued on following page)



sought a declaration that the defendants have violated their constitutional rights through the expenditure of

---

(Continued from previous page)

freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Freedom of association is protected both by the free speech clause of the First Amendment and the due process clause of the Fourteenth Amendment. "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." (Healy v. James (1972) 408 U.S. 169, 181 [33 L.Ed.2d 266, 279].) Thus, "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (Roberts v. United States Jaycees (1984) \_\_\_ U.S. \_\_\_ [82 L.Ed.2d 462, 474].) "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause, . . . which embraces freedom of speech." (National Asso. For The A. C. P. v. Alabama (1958) 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498].) Consequently, "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." (Kusper v. Pontikes (1973) 414 U.S. 51, 56-57 [38 L.Ed.2d 260, 266]; see generally, Tribe, American Constitutional Law (1978) §§ 12-1 to 14-13, pp. 576-885; Emerson, *Freedom of Association and Freedom of Expression* (1964) 74 Yale L.J. 1.)

The California Constitution contains similar guarantees: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech

(Continued on following page)

mandatory bar dues and the use of the name of the State Bar of California for the advancement of political and ideological purposes; an injunction restraining the use of mandatory dues and the name of the State Bar to advance such purposes; and an injunction compelling the members of the Board of Governors to reimburse the treasury of the State Bar for the amount they authorized to be expended for political and ideological purposes since September 12, 1982.<sup>3</sup> In the alternative the plaintiffs sought similar relief in a proceeding for a writ of mandate. On two subsequent occasions the complaint was amended to name additional plaintiffs.

The defendants answered and admitted that they have expended portions of the revenue from compelled

---

(Continued from previous page)

or press." (Cal. Const., art I, § 2, subd. (a).) "The people have the right to . . . petition government for redress of grievances, and assemble freely to consult for the common good." (Cal. Const., art I, § 3.)

<sup>3</sup> Plaintiffs also allege that the amount of the mandatory membership dues is set by statute and that the defendants have no discretion to lower the amount of the dues or to rebate a portion of the dues to members who object to the use of dues to advance political and ideological purposes. This allegation is erroneous. The board, not the Legislature, sets the amount of the annual dues, although it must be set within a maximum set by the Legislature. (§ 6140.) And the board may provide by rule for the waiver of the payment of the annual membership fee by any member, or any portion thereof, or any penalty thereon. (§ 6141.1.) Nonetheless, the record makes clear that the board believes it has the right to engage in political and ideological activity supported by membership fees of dissenting members, and it refuses to waive payment of any portion of such members' dues.

membership fees for purposes of lobbying the Legislature, filing amicus curiae briefs in litigation, financing meetings of the Conference of Delegates, publicizing the speeches of the president of the State Bar, and for financing a public education project on the judiciary. They deny, however, that these expenditures were in violation of the plaintiffs' constitutional rights. Defendants also set forth as affirmative defenses: (1) the failure to state a cause of action; (2) laches; (3) estoppel and/or unclean hands; and (4) that they are privileged to do the acts complained of due to legislative authorization and that they acted in good faith.<sup>4</sup> The trial court sustained the demurrer of the plaintiffs to the defense of estoppel and/or unclean hands without leave to amend.

Defendants moved for summary judgment, or in the alternative summary adjudication of issues or judgment on the pleadings. The plaintiffs countermoved for partial summary judgment.

Although the parties submitted much documentation in support of and in opposition to the respective motions, there is no real factual dispute about the State Bar and its recent activities. As the California Supreme Court recently recounted, "[i]n 1927, the Legislature adopted the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) establishing 'what is known as an "integrated" bar, i.e.,

<sup>4</sup> Defendant Phyllis M. Hix answered separately from the other defendants. Although she answered the allegations of the complaint in the same manner as the other defendants, the only affirmative defenses she set forth were the failure to state a cause of action, and that her actions were privileged. Hix is not involved in this appeal.

an organization of members of the legal profession of the state with a large measure of self-government, performing such functions as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice.' (1 Witkin, Cal. Procedure (1970 ed.) Attorneys, § 157, p. 168.)" (Saleeby v. State Bar (1985) 39 Cal.3d 547, 557.)<sup>5</sup> Thus, the State Bar is authorized to establish an examining committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill[ed] the requirements. . . ." (§ 6046, subds. (a), (c).) Under the board's auspices, local administrative committees may investigate complaints about the conduct of members and may thereafter forward reports and recommendations to the board for action. (§ 6043, subds. (a), (c).) After a hearing, the board "has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproof, public or private, with such recommendation." (§ 6078.) "In those two areas, the bar's role has consistently been articulated as that of an administrative

<sup>5</sup> "An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments." (Note, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined* (1980) 22 Ariz. L. Rev. 939, 941, fn. omitted.) It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. (See Winters, *Bar Association Organization and Activities* (1954) p. 1.)



assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. In the area of admission to practice, an applicant is admitted only by order of the Supreme Court which, upon certification by the bar's examining committee that the applicant fulfills the admission requirements, 'may admit such applicant as an attorney at law in all the courts of this State. . . .' (Saleeby, *supra* at p. 557; citations omitted.) In addition to those duties, the State Bar enforces the law relating to the unlawful practice of law and illegal solicitation (§§ 6030, 6125-6131, 6150-6154), administers an arbitration system for fee disputes (§ 6200-6206), maintains a client security fund (§ 6140.5) and engages in other similar matters relating to the legal profession. For the sake of convenience, we shall refer to these activities as the State Bar's regulatory function.

In addition to its regulatory powers, the board is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." (§ 6031, subd. (a)).<sup>6</sup> This has been called the "laudable general purpose

---

<sup>6</sup> In addition, the board is authorized by that subdivision to aid in "all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

In 1984 the Legislature restricted the administration of justice function by prohibiting the board, or anyone under its auspices, from engaging in any evaluation of appellate justices. Section 6031, subdivision (b) now reads: "Notwithstanding this section or any other provision of law, the board shall not

(Continued on following page)

of the [State Bar] act." (Herron v. The State Bar (1931) 212 Cal. 196, 199.) The bar's general counsel has described section 6031 as "the spring board for State Bar activities." (Use of Mandatory State Bar Dues, Assembly Committee on Judiciary, hearing 9/17/79, letter of Herbert M. Rosenthal, p. 111.) We shall call this the State Bar's administration of justice function. Some of these functions have been statutorily delineated; most have not. For example, the State Bar is mandated by statute to cooperate with and give assistance to the Commission on Judicial Performance (Gov. Code, 68725), to assist the Law Revision Commission (Gov. Code, § 10307), and to evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record. (Gov. Code, § 12011.5.)

In aid of all of its powers, the State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes."

---

(Continued from previous page)

conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature. [¶] The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such evaluation, review, or report in his or her individual capacity. [¶] The provisions of this subdivision shall not be construed to prohibit an evaluation of potential judicial appointees or nominees as authorized by Section 12011.5 of the Government Code." (Stats. 1984, ch. 16, § 2, p. \_\_\_\_.)



(§ 6001, subd. (g).) In sum, the State Bar has two legitimate but divergent functions: one is to regulate the practice of law and the other to advance the administration of justice.

To carry out its functions, the State Bar is governed by a Board of Governors of 22 members, 16 of whom are members of the State Bar and 6 of whom are nonattorneys appointed by the Governor of the State with approval of the Senate. (§§ 6010, 6011, 6013.5.) Fifteen of the attorney members of the board are elected by the members of the State Bar from geographical areas established by the Legislature, and one member is elected by the board of directors of the California Young Lawyers Association. (§§ 6012, 6013, 6013.4.) The board elects the officers of the State Bar. (§§ 6021-6024.) The State Bar has established a Conference of Delegates, which consists of representatives of voluntary local and special bar associations. The conference meets once a year to consider proposals, many of which are intended for legislative action. The board has also from time to time established committees or sections open to members of the bar interested in particular areas of the law and which advise the board in those areas. The board has also appointed commissions, which include nonattorneys as members. The board employs lobbyists to assist in the bar's legislative program.

There are, concededly, "difficult problems in drawing lines" between activities related to the governance and regulation of the practice of law and engaging in recommendations for the improvement of the administration of justice on the one hand and those relating to ideological activities unrelated to such functions on the other hand. (See *Abood v. Detroit Board of Education*, supra, 431 U.S.

at p. 236 [52 L.Ed.2d at p. 285].) But the State Bar has made no showing in its motion for summary judgment that it did not use compelled membership fees to advance political and ideological causes which were not reasonably related to the regulation of the practice of law or the advancement of the administration of justice, or if germane, which do not impose additional and unjustified burdens on First Amendment rights. Although the State Bar expended substantial sums in lobbying the Legislature in years past, it did not undertake in its motion to show that its lobbying efforts were limited to the advancement of its statutory purposes. It has also underwritten some of the cost of the Conference of Delegates and the conference has occasionally strayed from matters relating to the administration of justice to more global issues of statecraft. In 1981, for example, the Conference of Delegates considered such issues as the Federal War Powers Act, limiting the United States presidency to a single six-year term, the participation of American athletes in the Olympics and Pan American games, and the federal budget. In 1982 the conference had scheduled consideration of resolutions on such issues as the repeal of the presidential proclamation concerning draft registration, a bilateral nuclear weapons freeze, a transfer of funds from the federal military budget to meet specified social needs, establishment of Dr. Martin Luther King, Jr.'s birthday as a national holiday, and legislative reapportionment.

In 1982 the State Bar engaged in two other activities which the plaintiffs abhor. First, was the use of compelled membership fees to finance and publicize the speeches of then president Anthony Murray. The second was the use

of compelled membership fees for a public education project. Both concerned judicial retention or recall elections. In September, Murray used the occasion of his swearing in as president to adopt what is described as a political and ideological position on judicial retention, and to announce the statewide public education project. Murray adopted the position that the only legitimate basis for voting not to retain a justice in a retention election is a showing of incapacity or misconduct. He described the views of those who disagree as "the idiotic cries of self-appointed vigilantes," and "hysterical 'soft-on-crime' rantings." Those who hold such views were depicted as "self-seeking prosecutors and lawyers who want to be judges," "unscrupulous politician[s]," "bullies," and "political mercenaries who are trying to pull down our legal system." Naturally, dissenters are offended by being forced to underwrite their own public vilification.

The public education project was designed to support and spread the views expressed by Murray. It consisted of materials sent to local groups with instructions on the best means of educating the public in accordance with those views. In order to promote the education project the board passed a resolution stating that it is the duty of attorneys to support an independent judiciary and calling upon members of the State Bar to take steps to educate the public on such matters. Murray utilized this resolution in seeking support for his views from local groups.

Plaintiffs object to being compelled to provide financial support for the advancement of any political and

ideological beliefs as a condition to practicing their profession. The defendants do not deny that they use compelled membership fees to promote political and ideological views. They assert that they have the right to do so, and that plaintiffs' suit is an attempt by a minority to impose their will upon the majority, or to stifle the speech of the majority.<sup>7</sup>

Although defendants' principal motion was for summary judgment, they originally supported the motion by only two innocuous declarations. Both were by the bar's

---

<sup>7</sup> In fact, nothing in the record supports the conclusion that the views of the State Bar as adopted by the Board of Governors actually reflect the views of the majority of the membership. In September and October, 1980, the Field Research Corporation conducted a survey of the membership for the State Bar. With regard to legislative lobbying, 65 percent of the membership felt that the State Bar should actively lobby to affect the outcome of legislation which affects the practice and procedure of law, and another 25 percent felt the bar should take a position as an organization on such matters. With regard to legislation affecting the economic interest of lawyers, 46 percent felt the bar should actively lobby, and 25 percent felt the bar should take a position. With regard to areas of substantive law where lawyers have special expertise, 42 percent felt the bar should lobby, and 36 percent felt the bar should take a position. With regard to social issues in which there is substantial public controversy, only 9 percent felt the bar should lobby, and 27 percent felt the bar should take a position. On matters involving social issues upon which there is little or no public controversy, 6 percent felt the bar should lobby, and 17 percent felt the bar should take a position. An apt generalization could be that the further removed an issue is from the practice of law the smaller is the portion of the membership which will support bar activity in advancing a view.



legislative representatives and both of these lobbyists declared that they represented the "State Bar of California as a public corporation and not the individual members." Subsequently, the defendants filed supplemental declarations in support of their motion. The declaration of Truitt A. Richey, Jr., an attorney employed in the Office of the General Counsel, described the bar's amicus curiae program. Mr. Richey asserted that it was his "observation that this participation [in the amicus curiae program] has been limited to issues basic to the State Bar, e.g., validity and interpretation of the State Bar Act or State Bar rules; validity and interpretation of legislation that the State Bar has sponsored; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships." Mr. Richey then set forth a brief description of the matters in which the State Bar had participated as amicus curiae since January 1977. Those descriptions support Mr. Richey's observation. Mary G. Wailes, an attorney and Secretary of the bar, filed a series of declarations. They generally described the legislative oversight of the State Bar, its relationship with its members and the public, the Conference of Delegates, and other organizational matters.

Code of Civil Procedure section 437c, subdivision (b) directs that a motion for summary judgment "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken." Subdivision (c) of that section mandates that the "motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." It follows then as a matter of statutory dictate that "[s]ummary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (Lipson v. Superior Court (1982) 31 Cal.3d 362, 374; citations omitted.)

As we have noted, defendants made no showing at all in support of their motion for summary judgment that the State Bar did not use compelled membership dues to advance political and ideological causes. No doubt the reason for that omission was the defendants' categorical position that the State Bar is a governmental agency and, like all government, may engage in purely political and ideological conduct. That contention is the lynchpin upon which this case hangs or falls.

The trial court granted summary judgment in favor of the defendants. It agreed that the State Bar is a governmental agency authorized to do the acts which plaintiffs find objectionable. While express constitutional or statutory authorization did not exist for all of the activities, the court felt such authority should be implied. The court found that the First Amendment is not a bar to these activities. With regard to the individual defendants, the court found that the plaintiffs failed to show they did not act with due care, and that it appeared they acted in good faith. Judgment was entered in favor of all defendants. This inevitable appeal followed.



## II

We begin our journey by sketching the constitutional terrain we must traverse. In *Railway Employees' Dept. A.F.L. v. Hanson* (1955) 351 U.S. 225 [100 L.Ed. 1112], the United States Supreme Court was confronted with a claim that government-sanctioned compelled membership in a union as a condition of continued employment was a violation of the free speech clause of the First Amendment. The case involved a challenge to the federal Railway Labor Act (45 U.S.C. § 152), which provided that, notwithstanding any state law, a carrier and a union could agree that all employees were required to join the union. The Court upheld the provision, noting that the wisdom of the legislation was not at issue and that Congress could properly conclude that employees who receive the benefits of union representation in collective bargaining should be required to share financial support for it. (351 U.S. at pp. 233-235 [100 L.Ed. at pp. 1131-1132].) But the United States Supreme Court cautioned in *Hanson*: "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." (*Id.*, at p. 235 [100 L.Ed. at p. 1132].) The record contained no evidence that the compelled union dues were used for any purpose other than collective bargaining, and the court held that on the record there was no more infringement or impairment of First Amendment rights than in the case of a lawyer who is compelled to be a member of an integrated bar. (*Id.*, at p. 238 [100 L.Ed. at pp. 1133-1134].)

In 1961, in *International Machinists v. Street*, 367 U.S. 740, [6 L.Ed.2d 1141], the Court considered another challenge to a union-shop agreement under the Railway

Labor Act. In that case there was evidence that the compelled union dues were used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." (367 U.S. at p. 744 [6 L.Ed.2d at p. 1147].) Rather than consider the constitutional questions, the Court construed the Act to prohibit the use of compulsory dues for political purposes, and remanded the case to the Supreme Court of Georgia to devise a remedy. (*Id.*, at p. 768 [6 L.Ed.2d at pp. 1160-1161].) As the high court later recounted, the *Street* court "held that the Act does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked. The Court did not express a view as to 'expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support union political activities.'" (*Ellis v. Railway Clerks* (1984) \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 436], citations omitted.)

In a companion case to *Street*, the Court considered a challenge to the Wisconsin integrated bar on constitutional grounds. (*Lathrop v. Donohue* (1961) 367 U.S. 820 [6 L.Ed.2d 1191].) Although the court could not agree on an opinion, six of the members of the court were of the view that a state may constitutionally condition the right to practice law on membership in an integrated bar. (367 U.S. at p. 843 [6 L.Ed.2d at p. 1205], plurality opinion, and 367 U.S. at p. 849 [6 L.Ed.2d at pp. 1208-1209] concurring opinion.) The Court did not reach a decision

on whether an integrated bar may constitutionally use compelled membership fees for political and ideological purposes. The plurality opinion found that "the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]." (367 U.S. at p. 843 [6 L.Ed.2d at p. 1205].) The four member plurality found that the issue was not presented on the record before the Court, and accordingly the question whether an attorney may be compelled to provide financial support for political activities he opposes was not decided. (*Id.*, at pp. 847-848 [6 L.Ed.2d at pp. 1207-1208].)

The question of compulsory fees as a condition of employment arose again in *Abood v. Detroit Board of Education*, supra, 431 U.S. 209 [52 L.Ed.2d 261]. In that case the board had entered into a contract with a teachers' union pursuant to which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues of members, a so-called "agency shop" agreement. Although the Supreme Court recognized that compelling employees to contribute financial support to their collective bargaining representative does have an "impact" on their First Amendment rights, insofar as the service fees were used for collective bargaining, contract administration, and grievance adjustment purposes the fees were nevertheless permissible under the decisions in *Hanson* and *Street*. (431 U.S. at pp. 222-223, 232 [52 L.Ed.2d at pp. 276, 282].)<sup>8</sup>

<sup>8</sup> The history of the *Hanson*, *Street* and *Abood* trilogy was recently expostulated in *San Jose Teachers Assn. v. Superior*

(Continued on following page)

*Abood* presented the issue which had not been decided in *Hanson* and *Street*: whether compelled fees as a condition of employment could be used for political and ideological purposes unrelated to collective bargaining. This was so because the Michigan Court of Appeals had held that state law permitted the use of fees for such purposes, and the plaintiffs had alleged that such expenditures were made. On this question the Court had no difficulty in declaring that the agency-shop agreement and the state law which permitted it violated the federal constitution. "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. [Citations.] Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. [Citations.]" (431 U.S. at pp. 233-234 [52 L.Ed.2d at p. 283].) The First Amendment, the court further ruled, protects the right to contribute to an organization to spread a political message the contributor espouses, and the amendment is no less infringed where contributions are compelled rather than prohibited. (431 U.S. at p. 234 [52 L.Ed. at p. 284].)<sup>9</sup>

(Continued from previous page)

Court (1985) 38 Cal.3d 839. As the California Supreme Court noted, the *Abood* court "reject[ed] the arguments of protesting employees that *Hanson* and *Street* should not control in *Abood* because of the distinctive nature of public employment." (*Id.*, at p. 846, fn. 2.)

<sup>9</sup> More recently, the high court declined to view a challenged impairment of associational rights "through the prism

(Continued on following page)



The *Abood* court did not hold that the union could not constitutionally spend funds for the expression of political and ideological views. Rather, it held that such expenditures must be financed from the charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will. (*Id.*, at pp. 235-236 [52 L.Ed.2d at pp. 284-285].) As the high court later noted, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees." (Minnesota Bd. for Community Colleges v. Knight (1984) 465 U.S. 271, 291 [79 L.Ed.2d 299, 316, fn. 13].) In sum, the *Abood* court "found no constitutional barrier to an agency shop agreement between a municipality and a teachers' union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance

---

(Continued from previous page)

of procedural due process protections necessary for deprivations of property. As in *Abood*, we analyze the problem from the perspective of the First Amendment concerns." (Chicago Teachers Union v. Hudson (1986) \_\_\_ U.S. \_\_\_ [89 L.Ed.2d 232, 245, fn. 13].) The First Amendment requires its own safeguards to "insure that the government treads with sensitivity in areas freighted with First Amendment concerns." (*Id.*, at p. \_\_\_ [p. 245, fn. 12].) Since the allowance of an agency shop is itself an impingement upon First Amendment rights, the government and the union have a responsibility to minimize that impairment and to facilitate a dissenter's ability to protect his rights. (*Id.*, at p. \_\_\_ [pp. 247-248, fn. 20].)

adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." (Ellis v. Railway Clerks, *supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 441].) As we have noted, the *Abood* court recognized that difficult problems would arise in drawing lines between activities which are permissibly financed by compelled fees and those which are not. It did not attempt to draw such a line because the case was presented after a judgment on the pleadings without an evidentiary hearing. (*Abood*, *supra*, 431 U.S. at p. 236 [52 L.Ed.2d at 285].)

The high court had occasion to draw that line in *Ellis v. Railway Clerks*, *supra*, \_\_\_ U.S. at p. \_\_\_ [80 L.Ed.2d at p. 441], when it was called upon "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." The court held that under the Railway Labor Act "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the



bargaining unit." (*Id.*, at p. \_\_\_\_ [80 L.Ed.2d at p. 442].)<sup>10</sup> If the challenged expenditures are authorized by the Act, then the only constitutional issue remaining is "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." (*Id.*, at p. \_\_\_\_ [80 L.Ed.2d at p. 447].)

The central question in this case is whether the constitutional limitations of *Abood* apply to an integrated bar association. Stated another way, the issue is whether a lawyer, as a condition to becoming and remaining an attorney with the right to practice law, may be required to join and pay membership dues to an organization which uses a portion of those dues not to foster its legitimate purposes but rather to finance political and ideological ideas contrary to his or her own beliefs. We find the principle of *Abood* to be applicable and controlling because we discern no persuasive reason why lawyers should be treated differently than other public or private persons for First Amendment purposes and because we conclude that the State Bar, when acting in its administration of justice function, speaks for itself and not the State

<sup>10</sup> In *Chicago Teachers Union v. Hudson*, supra, \_\_\_\_ U.S. \_\_\_\_ [89 L.Ed.2d 232], the court adhered to the view that a dissenting employee may not be required to support financially any ideological causes not germane to the union's duties as a collective bargaining agent. (*Id.*, at p. \_\_\_\_ [89 L.Ed.2d at p. 244].) The court expressly declined to consider whether a dissenting employee may be required to contribute to non-germane, non-ideological expenditures. (*Id.*, at p. \_\_\_\_ [89 L.Ed.2d at p. 245, fn. 13].)

of California and consequently is more analogous to a labor union than to government. Indeed, as the plurality opinion in *Lathrop* forecast, the case involving an integrated bar is no different from the union-shop agreement at issue in *Hanson*. (367 U.S. at p. 842 [6 L.Ed.2d at p. 1205].)

The historical underpinnings of the practice of law do not support the defendants' position that compelled membership fees may be utilized to promote political and ideological positions unrelated to the practice of law or the administration of justice. For many years the right to practice law was regarded as a mere privilege upon which the state could place such conditions and restrictions as it saw fit. (*Cohen v. Wright* (1863) 22 Cal. 293, 323.) Indeed, in *Lathrop* at least one justice relied upon that ground. (367 U.S. at p. 865 [6 L.Ed.2d at p. 1218], concurring opinion of Whittaker, J.) That earlier view has now been thoroughly discredited. (*Konigsberg v. State Bar of California* (1957) 353 U.S. 252, 257 [1 L.Ed.2d 810, 816]; *Schwartz v. Board of Bar Examiners* (1957) 353 U.S. 232, 238 [1 L.Ed.2d 796, 801].) Our own Supreme Court has found it impossible to consider admission to the profession to be a mere privilege. (*Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 452, fn. 3.) Instead, the opportunity to practice law is a fundamental right protected by the Privilege and Immunities Clause of the federal Constitution. (*Supreme Court of New Hampshire v. Piper* (1985) \_\_\_\_ U.S. \_\_\_\_ [84 L.Ed.2d 205, 213].)

It has been equally well established that the protection of the First Amendment extends to those who are or would be lawyers. In *Baird v. Arizona* (1971) 401 U.S. 1

[27 L.Ed.2d 639], an applicant had been refused admission to the Arizona bar after she refused to answer a question concerning past associations. After the Arizona Supreme Court upheld the denial of admission, the United States Supreme Court reversed. The four justice plurality opinion noted that the First Amendment protects associational freedom and that a state cannot exclude a person from a profession solely because he is a member of a particular political organization or because he holds certain beliefs. (401 U.S. at p. 6 [27 L.Ed.2d at pp. 646-647].) The First Amendment limits a state's power to inquire into beliefs and associations and the state bears a heavy burden to show that such inquiry is necessary to protect a legitimate state interest. (*Id.*, at pp. 6-7 [27 L.Ed.2d at p. 647].) In short, "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law." (*Id.*, at p. 8 [27 L.Ed.2d at p. 647].) A fifth justice concurred because the State Bar's purpose in asking the question was to inquire into political beliefs, "[y]et the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs." (401 U.S. at pp. 9-10 [27 L.Ed.2d at pp. 648-649], concurring opinion of Stewart, J.) The same result was reached on similar facts in *Re Stolar* (1971) 401 U.S. 23 [27 L.Ed.2d 657]. Since it is clear that the associational rights of attorneys are protected by the First Amendment, and since those rights are infringed equally by compelled rather than prohibited contributions for political purposes, no plausible reason appears why *Abood* should not apply to integrated bar associations.

Likewise, the historical underpinnings of the California integrated bar do not support the defendants' contentions. The power of the Legislature to regulate the practice of law has long been recognized. In *Ex Parte Gregory Yale* (1864) 24 Cal. 241, at page 244, the Supreme Court said with regard to attorneys: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute." When the Legislature determined to integrate the California bar, the Act was upheld on the basis that it was a reasonable exercise of the legislative power to regulate the practice of law. In *State Bar of California v. Superior Court* (1929) 207 Cal. 323, at page 334, the Court said: "When we turn to those sections of the State Bar Act which purport to invest the board of governors, or its administrative committees, with governmental functions and disciplinary powers we find that these uniformly and expressly have relation to the *practice* of the law." In *Brydonjack v. State Bar* (1929) 208 Cal. 439, at page 443, the court acknowledged that "the power of the legislature to impose reasonable restrictions upon the practice of the law has been recognized in this state almost from the inception of statehood."

The issue of compelled membership fees was upheld at an early date. In *Carpenter v. The State Bar* (1931) 211 Cal. 358, the petitioner had failed to pay his bar dues and penalties and he disclaimed liability for such payments. The Supreme Court said: "The validity of the State Bar Act as a regulatory measure under the police power



has been repeatedly upheld by this court. When that fact is conceded, it follows as a matter of course that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues." (*Id.*, at p. 360; citations omitted.) Likewise, in *Herron v. State Bar*, *supra*, 24 Cal.2d at page 64, the Court noted that the State Bar Act is valid as a regulatory measure under the police power, and that "the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues."

The legislative power to regulate a profession was explained with regard to real estate brokers and salesmen in *Riley v. Chambers* (1919) 181 Cal. 589, at pages 592-593, as follows: "Nor can it be controverted that the right to engage in a lawful and useful occupation cannot, in effect, be taken away under the guise of regulation. On the other hand, it is equally true that a lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only, is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the legislature, and whose exercise is one of the latter's most important functions." If an act is a valid regulatory measure, then reasonable fees imposed to defray the expenses attached

to the administration of the law may be imposed. (*Shaffer v. Beinhorn* (1923) 190 Cal. 569, 573.)

It was these authorities which the Supreme Court relied upon in upholding the integration of the State Bar, and the imposition of reasonable fees upon members. (See *Carpenter v. The State Bar*, *supra*, 211 Cal. at p. 360.) From these cases two principles may be derived. First, in the exercise of the police power the Legislature may validly regulate the practice of the legal profession. Second, the members of the legal profession may be charged reasonable fees to defray the costs of the regulation of the profession and the costs of implementing the State Bar Act and its purposes. Yet nowhere in these authorities is it suggested that it is within the power of either the Legislature or the State Bar to compel membership in a political organization or to require members of a profession to provide financial support for the advancement of political and ideological ideas which are unrelated to the regulation of the profession or the administration of justice.

The defendants assert that the State Bar is a public agency and that membership fees are actually taxes upon the right to practice law. They assert that the use of such fees for the advancement of political and ideological ideas is simply a case of the government adding its own voice to the many that it must tolerate, and is thus permissible under this court's decision in *Miller v. California Com. On Status of Women* (1984) 151 Cal. App.3d 693. In *Miller* we were confronted with a taxpayer suit seeking either to abolish the commission or to prohibit it from lobbying or promoting its views on measures to improve the status of women, as the Legislature had



expressly authorized. We rejected the challenge. We noted that government may no more compel someone to express a view than it may forbid someone from voicing one. Although it may not compel citizens to contribute to a nongovernmental entity for the support of political and ideological activity, this does not mean that government itself must be ideologically neutral. (151 Cal.App.3d at p. 700.) Government has legitimate interests in informing, in educating, and in persuading, and it may add its voice to the marketplace of ideas on controversial topics. (*Id.* at p. 701.) Nevertheless, it may not, in the guise of governmental speech, trammel the free speech rights of its citizens. (*Ibid.*)

Our decision in *Miller* is inapplicable here for two reasons. First, the commission was established by the government and authorized to speak on its behalf, but no one was forced to add his or her assent to the government's voice in advocating a belief. Second, the commission was funded by the government out of its general funds. No one was compelled to finance the government's voice as a condition of employment or the right to engage in a profession. In contrast, the State bar purports to speak on behalf of its members, and thus plaintiffs' voices are compelled to be added to those of the bar. And, of course, the plaintiffs are compelled to finance the bar's voice as a condition of engaging in their profession.

But even further, the State Bar is a unique organization which partakes of some governmental attributes and some nongovernmental characteristics. Because of its singular character, the State Bar cannot be deemed a regular state agency. As William Hamm, the Legislative Analyst,

testified before a legislative committee, "Article VI, Section IX, of the State Constitution creates the State Bar as a public corporation, and it makes Bar membership mandatory for all practicing attorneys in California. The Bar is not a regular state agency, and, as a consequence, its expenditures are not reviewed and approved by the Legislature as part of the budget process each year. The Legislature, however, does set a ceiling on the membership fees that the Bar may charge practicing attorneys. . . . [¶] The Bar is an administrative arm of the California Supreme Court in matters of admission and discipline of attorneys, the crediting and monitoring of law schools, and in regulating legal specialization. These activities are mandated by statute or court rules, and thus the Bar is required to undertake these activities. In addition to these mandatory activities, the Bar is authorized, but not required, to administer various other programs that the Bar deems necessary to advance the legal field." (Review and Briefing on Legislative Analyst Report on the State Bar, Special Legislative Investigating Committee on the State Bar, March 11, 1980.) It is this dichotomy of function that makes the State Bar "*sui generis*." (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300.) Thus for its mandatory functions, the State Bar and its officers and employees are public officers. (See e.g., *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 565-566.) But that does not make the State Bar the government or imbue it with the government's right to speak to political and ideological matters unrelated to the legal field.

It is true that the State Bar is designated a "public corporation." But as we shall endeavor to show, not all public corporations constitute government. Former Civil

Code section 284 defined a public corporation as follows: "public corporations are formed or organized for the government of a portion of the state." Thus it was that *Bettencourt v. Industrial Acc. Com.* (1917) 175 Cal. 559, at page 561, held that "[p]ublic corporations, therefore, under the controlling definition of the law are those corporations formed for political and governmental purposes and vested with political and governmental powers."<sup>11</sup> In *State Bar of California v. Superior Court*, supra, 207 Cal. 323, it was contended that the State Bar, despite its designation as such, could not be a public corporation because its purpose and function were not the "government of a portion of the state." The Supreme Court rejected that contention in this fashion: "It is to be noted in considering this contention that the constitution does not attempt to define the several sorts of corporations which may be formed by or in accordance with legislative action, but that the foregoing definition of what shall constitute public as distinguished from private corporations is purely of statutory origin. This being so it must be clear that the provisions of the Civil Code above quoted could not be held to constitute a limitation upon later legislation to create public corporations for other purposes than those relating to 'the government of a portion of the state.' It is a fact within general knowledge that the state legislature has, upon not a few occasions

<sup>11</sup> Although the statute has long since been repealed, this definition of a public corporation has occasionally been repeated. (See. e.g., *Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal. App.3d 400, 407.)

since the adoption both of our present constitution and of the foregoing section of the Civil Code, provided for the creation of various kinds of public corporations or associations which did not have for their function or purpose the 'government of a portion of the state.' " (*Id.*, at p. 329.) Thus, while the State Bar is a public corporation, it is not a public body formed or organized for political or governmental purposes. In short, while the State Bar serves a public purpose and its officers may speak in the public interest to advance the administration of justice, it is not by that account the government. In the exercise of its administration of justice function the State Bar does not speak for the State of California or all of its citizenry. Instead, it speaks in its corporate capacity as a public corporation whose only members are attorneys licensed to practice law in California. (§ 6002.) Although its voice may advance a compelling state interest, it is nevertheless not governmental speech. Acting in its discretionary administration of justice capacity the State Bar must, therefore, be deemed a nongovernmental association. And as we noted in *Miller*, the Legislature "may not delegate the authority to a nongovernmental entity to extract funds for the support of political and ideological activity not directly related to the purpose for which the entity is given the power to levy." (*Miller v. California Com. on Status of Women*, supra, 151 Cal. App.3d. at p. 700.) Accordingly, the conclusion that government may add its voice to public controversies does nothing to undermine the objection to compelled membership and financial support for the political and ideological ideas alleged to have been espoused by the State Bar.



We likewise cannot accept the assertion that the membership fees required of attorneys are simply tax receipts which the government may spend as it likes. The fees do not purport to be taxes. (§ 6140.) The fees are imposed upon members of the State Bar regardless of whether they are practicing law. (§§ 6140, 6141.) The fees do not become a debt owed to the State Bar and the failure to pay them in itself cannot lead to criminal or civil actions, but only to suspension from membership in the Bar. (§ 6143.) And the fees may be waived. (§ 6141.1. See *Estate of Stanford* (1899) 126 Cal. 112, 117-120; *Doctors Hospital v. County of Santa Clara* (1957) 150 Cal.App.2d 53, 55-56.) More critical, however, is the fact that an integral part of the regulatory act is compelled membership in the State Bar. An attorney is not permitted to simply pay a license tax but decline to join the State Bar; he is required to become a member of the bar and pay membership fees. The failure to pay the fees does not directly deprive the attorney of the right to practice law; it is the suspension of membership which carries that result. (§ 6125.) It is thus clear that the fees are in fact membership fees imposed under the police power to regulate the practice of law, and as such they must be such as are reasonably necessary to pay the costs of regulation, together with the costs of aiding matters relating to the advancement of the administration of justice. (See *Herron v. State Bar*, *supra*, 24 Cal.2d at 64; *Carpenter v. The State Bar*, *supra*, 211 Cal. at 360.) To the extent such fees are used to advance political and ideological ideas unrelated to the regulation of the legal profession or the administration of justice, those fees stand on no different footing than the compelled agency-shop

fees required of Detroit's public school teachers as a condition of continued employment which were at issue in *Abood*. Because the State Bar speaks for itself rather than the state in the exercise of its discretionary administration of justice function, it is sufficiently analogous to a labor union to be treated similarly for First amendment purposes. "Certain characteristics of union organization and integrated bar organization make these two entities particularly susceptible to first amendment scrutiny. In each organization actual membership and/or compulsory financial support are required for continued employment in the particular field. Such compulsion is authorized by the state with respect to union agreements and established directly by state action regarding bar integration. Also, political and legislative activities are widespread in both entities." (Note, *First Amendment proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined*, *supra*, 22 Ariz. L. Rev. at p. 954.)

For all of these reasons, we conclude that the principles of *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209 [52 L.Ed.2d 261], apply to an integrated bar association. In so holding we note that all of the courts which have considered the question, although disagreeing on the consequences of their application, agree that the *Abood* principles apply to integrated bar associations. In *Arrow v. Dow* (1982) 544 F.Supp. 458, at pages 462-463, the United States District Court found *Abood* to be controlling in the context of the New Mexico State Bar's use of compelled membership fees for political and ideological purposes. Although declining to hold categorically that the bar was prohibited from spending bar dues for lobbying, the court concluded that "the lobbying efforts



presently under consideration were not directed to important governmental interests which would justify the infringement upon [dissenting members'] rights caused by using Bar dues to finance lobbying efforts." (*Id.*, at p. 463.) In *Schneider v. Colegio de Abogados de Puerto Rico* (1983) 565 F.Supp. 963, at page 978, the United States District Court held *Abood* to be controlling with regard to the Puerto Rican integrated bar. In a later decision the court refused to stay its judgment. (*Schneider v. Colegio de Abogados de Puerto Rico* (1983) 572 F.Supp. 957.) In *Romany v. Colegio de Abogados de P.R.* (1st Cir. 1984) 742 F.2d 32, the Court of Appeals held that in view of the fact that the Puerto Rican bar was working on a plan to avoid the use of dissenters' fees for ideological purposes, the District Court should have abstained from acting. However, the court agreed that *Abood* was applicable, and held that the District Court could properly enter an interim order to protect the dissenting members of the bar pending action by the local authorities. (742 F.2d at pp. 44-45.) In *Falk v. State Bar of Michigan* (1981) 411 Mich. 63, 305 N.W. 2d 201, at 217-218, a divided Supreme Court of Michigan, unable to agree upon a decision, remanded the case for an additional evidentiary hearing to develop the record concerning the bar's activities. Nevertheless, all the justices agreed that the *Abood* principles applied to the integrated bar of Michigan. Finally, our attention has been called to a decision of the Supreme Court of Florida refusing to amend its integration rule. (*The Florida Bar* (1983) 439 So.2d 213.) In that decision the court held that the improvement of the administration of justice and the advancement of the science of jurisprudence are compelling state interests.

Citing *Abood*, the court concluded that those interests may be advanced by any means that are "germane" to that interest.<sup>12</sup> (*Ibid.*)

### III

Our conclusion that the constitutional restrictions of *Abood* govern an integrated bar association leaves open the question of the scope of the activities in which the State Bar may engage without violating the First Amendment. We turn now to that question.

### A

Lawyers do not surrender their First Amendment rights by joining the State Bar. Members of the bar, no less than other persons, maintain their constitutional rights of free speech and association. But as is the case with other persons, those constitutional rights are not absolute. (*Roberts v. United States Jaycees*, supra, \_\_\_ U.S. \_\_\_, \_\_\_ [82 L.Ed.2d at p. 475]; *C. S. C. v. Letter Carriers* (1973) 413 U.S. 548, 567 [37 L.Ed.2d 796, 814]; *Konigsberg v. State Bar of California*, supra, 366 U.S. at p. 49 [6 L.Ed.2d at p. 116].) Even protected First Amendment rights may be impinged upon "if the State demonstrates a sufficiently important interest." (*Buckley*

<sup>12</sup> The Florida court further concluded that the political activities of the bar were germane to those compelling state interests. On this point, we disagree. As we explain in the text, purely political activities, such as engaging in election campaigning, cannot fairly be construed to relate to the administration of justice and hence cannot be characterized as being germane to the permissible activities of the State Bar.

v. Valeo (1976) 424 U.S. 1, 25 [46 L.Ed.2d 659, 691].) But to justify such a constitutional intrusion, the state must demonstrate a compelling governmental interest. (Cousins v. Wigoda (1975) 419 U.S. 477, 489 [42 L.Ed.2d 595, 604]; National Asso. For the A. C. P. v. Alabama, supra, 357 U.S. at p. 463 [2 L.Ed.2d at p. 1500].)

Few would deny that the state has a compelling interest in promoting the improvement of the administration of justice and the advancement of jurisprudence. Clearly there is such a compelling, indeed even a paramount, interest. As Justice Williams powerfully recounted in his opinion in *Falk v. State Bar of Michigan*, supra, 411 Mich. 63, 305 N.W.2d at p. 228: "The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy. [¶] As officers of the court, lawyers play an indispensable role in the administration of justice. The state must not only protect its legal machinery from abuse through such safeguards as the attorney grievance procedure but must also be mindful of the competence of attorneys, who are in a position to best assist, or most impede, the general public in securing justice. Authorizing the State Bar to aid the state in promoting improvements in the administration of justice is essential for the state's continued existence." We similarly conclude that the State Bar's statutory authorization "to aid in all matters pertaining to the advancement of the science of jurisprudence or to the

improvement of the administration of justice" embodies a compelling governmental interest.<sup>13</sup>

We also believe it is indisputable that the state has a sufficiently compelling interest in the regulation of attorneys to warrant an integrated bar. "The adequate protection of public interests, as well as inherent and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business." (In re Galusha (1921) 184 Cal. 697, 698.) The state's answer to this compelling need was to create an integrated bar which is largely self-governing and which provides essential assistance to the state in regulating and supervising the profession. (See *State Bar of California v. Superior Court*, supra, 207 Cal. 323.) Although an integrated bar constitutes a significant impingement upon the First Amendment rights of lawyers, that impingement is amply justified by the compelling governmental interest in the regulation of the legal profession. In *Aboud*, the compelling governmental interest fostered by Congress was the maintenance of labor-management peace through union collective bargaining.

---

<sup>13</sup> Jurisprudence, by definition, is "[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations." (Black's Law Dict. (5th ed. 1979) p. 767.) The administration of justice, on the other hand, relates to the adjudication or adjustment of rights and duties in a legal system. It is concerned with how a legal system is managed and conducted. "Administration is an exercise of power in a concrete situation for the accomplishment of private or public purposes." (Bodenheimer, *Jurisprudence, the Philosophy and Method of the Law* (Rev. ed. 1974) § 61. p. 284.)



Here the compelling state interests advanced by the Legislature are the regulation of attorneys and the improvement and advancement of jurisprudence and the administration of justice. Those functions constitute the State Bar's *raison d'être* and form the framework against which the constitutional challenge must be judged.

### B

In determining the scope of activities in which an integrated state bar may be permitted to engage, we apply the test set forth in *Ellis v. Railway Clerks*, *supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d 428]. There, in the context of a union-shop, the Supreme Court examined the First Amendment limitations upon the activities which a union can support with funds extracted from dissenters. (*Id.*, at p. \_\_\_ [p. 446].) Analogous limitations apply to integrated bar associations.

When the activity of the State Bar is clearly germane to either its regulatory or administration of justice function and that activity does not involve political or ideological causes, no constitutional barrier prohibits it. "At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.'" (*Ellis, supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 447], citation omitted.) Thus, for example, when the State Bar expends funds for the discipline of attorneys (§ 6040 et seq.) or to assist the Law Revision Commission (Gov. Code, § 10307), no First Amendment restrictions preclude those expenditures.

At the other extreme, the State Bar may not constitutionally use compelled dues for the support of ideological or political causes not germane to its two statutory purposes. Once again the analogy to the union-shop is apt: "The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." (*Ellis, supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 441].)

The more difficult question arises when the expenditure of the State Bar is for an activity which relates to its statutory purposes in some fashion but also implicates additional First Amendment concerns.<sup>14</sup> In that case the critical issue is whether the challenged expenditure is sufficiently related to the State Bar's statutory functions to justify its imposition upon objecting members. This requires, in the case of unions, that a line be drawn "between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on

<sup>14</sup> In *Chicago Teachers Union v. Hudson* (1986) \_\_\_ U.S. \_\_\_ [89 L.Ed.2d 232] the high court found "it unnecessary to resolve any question concerning non-germane, non-ideological expenditures." (*Id.*, at p. \_\_\_, fn. 13 [89 L.Ed.2d at p. 245, fn. 13].) We also find it unnecessary to reach that issue. It is possible for the State Bar, with the use of compelled dues, to engage in conduct which exceeds its statutory authorization but which does not advance any political, ideological or other free speech and associational interest. Since the State Bar has no power to act in matters unrelated to its statutory purposes, we need not decide whether the First Amendment also bars any *ultra vires* act with compelled membership dues.



dissenters." (*Ibid.*) A similar line must be drawn for the State Bar. The dividing line depends upon "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." (*Id.*, at p. \_\_\_ [p. 447.]) In drawing that line it must be recalled that "by allowing the union shop at all, [the Supreme Court has] already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." (*Id.*, at p. 446.)

The test applied in *Ellis* consists of balancing the additional interference with First Amendment rights which such a challenged activity entails against an asserted governmental interest. Thus some activities which would not be permissible standing alone may nonetheless be allowed because they do not increase the infringement already resulting from the compelled, but justified, extraction. (*Ibid.*) The dissenters "may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." (*Id.*, at p. \_\_\_ [p. 447.]) Other activities may raise more serious First Amendment concerns but may be permissible because the additional interference is supported by a sufficient governmental interest. (*Ibid.*) This governmental interest need not be sufficient to support the total infringement; it need only be sufficient to justify the additional infringement that the expense entails. (*Ibid.*)

## C

We now apply the *Ellis* test to the activities challenged here. Some of the challenges can be resolved on the record before us. Others lack an adequate record and in keeping with the position taken by the *Aboud* court, we decline to attempt to divine precise lines for those challenged expenditures in an evidentiary vacuum. Instead, as to those expenditures, we undertake only to set the broad perimeter around which the line must be drawn in light of the challenge.

Plaintiffs specifically challenge the State Bar's use of membership fees to underwrite the cost of lobbying the Legislature, filing amicus curiae briefs in selected cases, holding meetings of the Conference of Delegates, disseminating the speeches of its former president and establishing a public information program concerning election of justices. We consider those challenges in order.

1. Lobbying. In the agency shop context, it has been held that the propriety of lobbying activities with compelled contributions depends upon the nature of the lobbying. For example, in *Robinson v. State of New Jersey* (3rd Cir. 1984) 741 F.2d 598, at page 609, the court said: "So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees." On the other hand, in *Beck v. Communications Workers of America* (C.W.A.) (4th Cir. 1985) 776 F.2d 1187, at pages

1210-1211, a union's lobbying expenditures with non-member fees were disallowed because some of those efforts ran far afield from the purposes of collective bargaining, and because the union made no effort to distinguish proper from improper lobbying activities. The court indicated, however, that some lobbying activities may be relevant to collective bargaining and hence may be proper.

In like fashion the State Bar may, without objection, engage in lobbying activities which are germane to its two statutory purposes. Since the State Bar is empowered to do all acts necessary or expedient for the attainment of its purposes (§ 6001, subd. (g)), the means it employs are generally not in issue. Thus the bar may elect to lobby the Legislature in order to promote the passage of laws which improve the administration of justice or which relate to the regulation and supervision of attorneys. But it is apparent that not all legislation is germane to the administration of justice or the regulation of the bar. A bill to create a new airport district, for example, does not relate to the administration of justice. It is equally obvious that the bar's right to lobby is not limited to procedural, as opposed to substantive, changes in the law. Not all improvements and advancements can be made by procedural changes. Thus, it is not lobbying per se that transgresses the constitutional line. Rather the question is whether the lobbying concerns matters relating to the State Bar's statutory functions. Lobbying activities to improve the administration of justice may relate to legislation which also has ideological overtones and may therefore arguably constitute some limited additional

infringement of the First Amendment rights of lawyers. In that case, the question is whether there is an "additional infringement of First Amendment rights beyond that already accepted, and . . . that is not justified by the governmental interests behind the [integrated bar] itself." (*Ellis, supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at p. 447].) Consequently, the validity of particular lobbying expenditures must be determined upon an adequate evidentiary record, keeping in mind that it is the Bar which bears the burden of proving the validity of its lobbying expenditures. (*Beck v. Communications Workers of America (C.W.A.)*, *supra*, 776 F.2d at p. 1211; see also *Chicago Teachers Union v. Hudson*, *supra*, \_\_\_ U.S. \_\_\_ [89 L.Ed.2d at p. 246].)

2. *Amicus Curiae Briefs.* Litigation expenses stand on the same footing as lobbying expenses. This much was recognized in *Ellis* where the court held that litigation expenses not having a direct connection with the bargaining unit may not be charged to objecting employees. The court acknowledged, nevertheless, that some litigation expenses are clearly chargeable to such employees as a normal incident of the duties of the union as the exclusive representative. By a parity of reasoning, the state's interest in the improvement of the administration of justice is sufficient to warrant the bar's participation in litigation which may affect the administration of justice. After all, a precedential judicial decision establishes the law of this state just as surely as a statutory enactment. Yet, it is apparent that not all lawsuits, simply because they are filed in a court, involve the administration of justice. The suit may only involve private litigants fighting over a personal dispute about which the State Bar



could not conceivably have a legitimate interest. The bar consequently cannot indiscriminately file amicus curiae briefs in lawsuits or otherwise engage in litigation. Thus, the resolution of the issue, once again, depends upon a proper record.

3. Conference of Delegates. The propriety of the meetings of the Conference of Delegates is also resolved by the decision in *Ellis*. There, with respect to union conventions, the court declared: "We have very little trouble in holding that [non-union employees] must help defray the costs of these conventions. Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions . . . seem to us to be essential to the union's discharge of its duties as bargaining agent." (*Id.* at p. — [80 L.Ed.2d at p. 442].) It is true that conventions have a "direct communicative content and involve the expression of ideas" and consequently implicate additional First Amendment concerns. (*Id.*, at p. — [80 L.Ed.2d at p. 447].) "Nonetheless, we perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." (*Ibid.*) The meetings of the Conference of Delegates serve much the same function as union conventions. Much of the bar's efforts with respect to its litigation and lobbying activities have originated with the Conference of Delegates. We have previously noted that the conference has occasionally strayed from the bar's regulatory and

administration of justice functions, but that does not preclude the use of objecting members' dues altogether. So long as the Conference of Delegates serves the State Bar's statutory functions, the bar may properly use compelled dues to support that portion of the conference's activities.

4. Speeches of the President. Plaintiffs do not object to the publication of the president's speeches in general. Rather they object to the publication of former president Anthony Murray's speeches and viewpoints in 1982. We have recounted the essence of those speeches and viewpoints and suffice it say here that he adopted a specific position about a public election and compulsory bar dues were used to advocate that position. We agree with plaintiffs that the challenged expenditures were improper.

The Constitution of California, article VI, section 16, subdivision (a) provides in relevant part: "Judges of the Supreme Court shall be elected at large and judges of the courts of appeal shall be elected in their districts at general elections at the same time and place as the Governor." Thus the Constitution leaves the election of appellate court judges to the "free election" of the People. (Cal. Const., art. II, § 3; see *Stanson v. Mott* (1976) 17 Cal.2d 206, 218.) The right to participate in a free election is the most precious right our system of government accords its citizens for without it other rights, even the most basic, are illusory. (*Williams v. Rhodes* (1968) 393 U.S. 23, 31 [21 L.Ed.2d 24, 31].) Indeed, the First Amendment finds its fullest and most urgent application precisely in the conduct of political campaigns. (*Patriot Co. v. Roy* (1971) 401 U.S. 265, 272 [28 L.Ed.2d 35, 41].) Our state Supreme Court has recognized the overriding importance of free elections to the people of California. "[W]e examine with



a close and questioning attention every intrusion, subtle or direct, which impairs or affects the unconditional exercise of these prerogatives." (*Johnson v. Hamilton* (1975) 15 Cal.3d 461, 469; see also *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 714; *Stanson v. Mott*, supra, 17 Cal.3d at pp. 218-219.) These principles apply whether the issue presented at the free election of the people is partisan or nonpartisan. (*Galda v. Rutgers* (3rd Cir. 1985) 772 F.2d 1060, 1064. See also *Stanson v. Mott*, supra, 17 Cal.3d at pp. 217-218; *First National Bank of Boston* (1978) 435 U.S. 765, 785-786 [55 L.Ed.2d 707, 723].) In fact, it was precisely this type of "political" activity which was condemned in an agency shop situation in *Abood*. (431 U.S. at p. 235 [52 L.Ed.2d at p. 284].)

It is apparent from these authorities that the use of compelled fees for election campaigning is not merely a slight additional impingement on First Amendment rights; it is a substantial additional interference, resulting in the most grievous infringement possible. It is doubtful that any governmental interest can justify such an infringement, but the interests asserted here, substantial though they may be, do not.<sup>15</sup>

<sup>15</sup> Nor do we find legislative authorization for the bar to engage in such political activities. *Stanson v. Mott*, supra, 17 Cal.3d 196, involved a different, but related, situation. There the director of the state parks department authorized the department to expend \$5,000 to promote the passage of an election bond measure to provide funds for the acquisition of park land. In a challenge to the use of departmental funds for election campaigning, the Supreme Court noted the serious

(Continued on following page)

We also must reject defendants' contention that these publications were simply a "public education program." In *Stanson v. Mott*, supra, 17 Cal.3d 206, the court recognized that the fair presentation of relevant information does not necessarily constitute election campaigning even though the information may relate to an election issue. (*Id.*, at p. 221.) The propriety of the expenditure depends upon the style, tenor and timing of the publication and whether it appears that the publication was designed primarily for the purpose of influencing the voters at an election. (*Id.*, at p. 222, esp. fn. 8.) In light of the record before us, defendants' claim that they were merely educating the public borders on the specious. Murray's position, and the bar's project adopted to support that position, were both designed for the expressed purpose of influencing the voters. Defendants adopted a position on how and why the electors should cast their votes and then campaigned to convince the electorate to follow that

(Continued from previous page)

constitutional questions such expenditures raised, both from the standpoint of distortion of the democratic electoral process and from the standpoint of using public funds, to which objecting electors had an equal right, to advocate a position contrary to their beliefs. (17 Cal.3d at pp. 216-217; see also *Mines v. Del Valle* (1927) 201 Cal. 273, 287.) The court found it unnecessary to resolve the constitutional questions, however, because it held that legislative authorization for the use of public funds for election campaigning cannot be implied but must be given in clear and unmistakable language. (*Id.*, at p. pp. 219-220. See also *International Machinists v. Street*, supra, 367 U.S. at pp. 768-769 [6 L.Ed.2d at pp. 1160-1161].) These same considerations are applicable here and we decline to find legislative authorization for the use of compulsory bar dues for election campaigning in the absence of clear and unmistakable language to that effect. Since election campaigning is not statutorily authorized, it is not germane to the statutory purposes of the State Bar.

position. The bar's campaign included efforts to disparage the position, personalities and motives of members and others who held and urged opposite views. This was election campaigning pure and simple and no compelling governmental interest justified it. These publications violated the First Amendment rights of dissenting members of the bar.

5. Public Education Programs. As with the objection to the publication of the president's speeches and views, the plaintiffs do not challenge public education programs in general. They challenge only the specific 1982 program designed to influence judicial elections. This limited attack is well advised, for public informational programs will often be an important means by which the State Bar advances its statutory functions.<sup>16</sup> Still, the bar may not engage in election campaigning in the guise of disseminating information to the public. What we said with respect to the president's activities is equally applicable here. Parts of the bar's 1982 public education program were clearly election campaigning and the use of compulsory dues for that political purpose breached the constitutional barriers erected by the First Amendment.

<sup>16</sup> As we have noted elsewhere in the margin, the Board of Governors of the State Bar is statutorily authorized to aid "such matters as concern the relations of the bar with the public." (§ 6031, subd. (a).) In furtherance of that purpose or its other statutory purposes the State Bar may engage, subject to the First Amendment constraints delineated in the text, in public information programs.

## D

But within the perimeters of its statutory purposes and the confines of the First Amendment the State Bar is entitled to use compelled membership dues even though some members may object to the manner of their use. The State Bar, after all, is not just a trade union. Under its statutory mandate, the State Bar bears a special public responsibility and is endowed with a commensurate right to speak in the public interest on matters in aid of the improvement of the administration of justice. The touchstone is the germaneness, not the popularity, of its acts. The broad lines of germaneness are easy to sketch and some of them we have already sketched. Whether our state constitution should be amended to provide for less than 12 jurors clearly relates to the administration of justice; whether the federal government should adopt an economic policy of balanced budgets does not. Naturally, the fine lines are more difficult to draw. All line drawing, at the fringes, bears some stamp of arbitrariness. As the fineness of the distinctions becomes more pronounced, the path of the boundary becomes less distinct. Because of that inherent obstacle to perfect demarcations, no doubt, in the words of Justice Holmes, "some play must be allowed for the joints of the machine" of the State Bar. (*Missouri, K. & T. R. Co. v. May* (1904) 194 U.S. 267, 270; see also *Ellis v. Railway Clerks*, *supra*, \_\_\_ U.S. \_\_\_ [80 L.Ed.2d at 447].) For all that, there are lines to be drawn and boundaries to be respected. Contrary to its position asserted here, the State Bar does not have plenary power to rove about to right every wrong and speak to every issue. Just as it is not a trade union, neither is the State Bar a public ombudsman.



But when the State Bar does act within the confines of its statutory functions, the fact that some of its members may disagree with its actions is not constitutionally relevant. Analytically, the State Bar's statutory functions are comparable to the collective bargaining functions of a union that were considered in *Abood*. As the *Abood* court noted, "[t]o compel employees financially to support their collective-bargaining representatives has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (*Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209, 222, fn. omitted.) By the same token, plaintiffs and other members may have philosophical objections to specific activities undertaken by the State Bar. But so long as

those activities are consistent with the bar's statutory purposes and do not impose additional infringements on the First Amendment rights of dissenters which are not justified by a compelling governmental interest, the State Bar is free to engage in them.

But the lynchpin of the bar's position, that it is government entitled to speak politically and ideologically, must fall and with it the favorable summary judgment. The State Bar has not demonstrated that there is no triable issue on whether it has engaged in political and ideological activities unrelated to its statutory purposes, or if germane, which do not impose additional infringements on the First Amendment rights of objecting members.

To the extent that plaintiffs establish in further proceedings that the State Bar has used compelled membership fees in excess of the statutory authority granted to it, or in violation of the principles of the First Amendment, they will be entitled, at the least, to declaratory relief. To the extent they establish that funds are spent in excess of statutory authority they will also be entitled to injunctive relief to prevent future expenditures. (*Stanson v. Mott*, *supra*, 17 Cal.3d at p. 223.) The First Amendment, however, does not require that the defendants be enjoined from future expenditures. The State Bar may expend funds for activities which are germane to its statutory purposes even though the expenditures, if funded by dues of dissenting members, would transgress First Amendment limitations. The constitution only requires that these transgressing expenditures not be financed with the compulsory dues of those who object. (*Abood*, *supra*, 431 U.S. at pp. 235-246 [52 L.Ed.2d at pp. 284-285].)



The remedy for such a situation, if the State Bar desires to engage in those activities, is to provide a scheme whereby the dissenting members are not required to finance the political or ideological activities of the State Bar. (*Chicago Teachers Union v. Hudson*, *supra*, 89 L.Ed.2d 232; *Ellis*, *supra*, 80 L.Ed.2d at p. 439; *Abood*, *supra*, 431 U.S. at p. 237, fn. 35.)

#### IV

We finally consider the propriety of the summary judgment in favor of the individual defendants. Plaintiffs sought to hold the members of the Board of Governors liable for amounts expended for improper purposes after September 12, 1982. The trial court found that plaintiffs failed to show that the board members did not use due care, and that the supporting papers showed that they acted in good faith. Summary judgment was therefore granted in favor of the individual defendants.

We first hold that the individual defendants may not be held responsible for expenditures which are authorized by statute but which impermissibly impinge upon plaintiff's First Amendment rights under *Abood* and *Ellis*. This is so because, as we have noted, the Constitution does not forbid such expenditures; it only requires that they not be financed with the compulsory dues of the dissenters. Accordingly, the individual defendants cannot be required to reimburse the bar for such expenditures, although the bar may be required to provide a remedy to the plaintiffs.

The individual defendants may be held, upon a proper showing, to reimburse the State Bar for expenditure of funds which are in excess of the bar's statutory powers.<sup>17</sup> In moving for summary judgment the individual defendants asserted, in their points and authorities,

---

<sup>17</sup> Perhaps due to the unique nature of the State Bar and this litigation, the parties have assumed that the standard set forth in *Stanson v. Mott*, *supra*, 17 Cal.3d at page 223, is controlling. There the Supreme Court held that a public official who authorizes the improper expenditure of public funds is personally liable for the repayment of those funds if he failed to exercise due care in permitting the expenditure, regardless whether he acted in good faith. In determining whether the official acted with due care all of the circumstances must be considered, including whether the expenditure's impropriety was obvious, whether the official was alerted to the possible invalidity of the expenditure, and whether the official relied upon legal advice or the presumed validity of a legislative enactment or a judicial decision. (17 Cal.3d at p. 227.) Defendants have maintained that this is simply a case of the government adding its voice to those it must tolerate, and if that claim were accepted it would follow that the individual defendants are public officials within the meaning of *Stanson v. Mott*. However, we have rejected the claim that the bar speaks for the government. Although the members of the board of governors have been held to be public officials in performing their mandatory function of regulating the practice of law (*Chronicle Pub. Co. v. Superior Court*, *supra*, 54 Cal.2d at p. 566; *Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 671), it is not clear that they are public officials with respect to the bar's discretionary administration of justice function. This raises a question of the appropriate standard to apply in determining whether the individual defendants may be held liable for repayment of unauthorized expenditures. (Compare Corp. Code, § 309 [under general corporation law a director is not liable if he acts in good faith and with such care, including

(Continued on following page)

that they had acted in good faith and that the plaintiffs had not shown that they had not. This was an insufficient showing to support summary judgment in favor of the individual defendants. The fact that the defendants may have authorized unlawful expenditures raises an issue as to their good faith and exercise of due care in doing so. In order to support summary judgment the defendants were required to present affidavits, declarations, and other supporting papers which would show that there is no triable issue of fact and that they were entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (b), (c).) The defendants bore the burden of furnishing supporting documents that established that all the claims of the plaintiffs were entirely without merit on any legal theory. (Lipson v. Superior Court, *supra*, 31 Cal.3d 362, 374.) Mere conclusory allegations are insufficient. (de Echeguren v. de Echeguren (1962) 209 Cal.App.2d 141, 146.) And this is particularly so where the conclusory allegations are contained in points and authorities and are unsupported by affidavits, declarations, or other appropriate supporting papers. Defendants failed to establish by competent evidence that they

---

(Continued from previous page)

reasonable inquiry, as an ordinarily prudent person would use in similar circumstances]; Malone v. Superior Court (1953) 40 Cal.2d 546, 551 [officer of an unincorporated association or a nonprofit corporation is to be treated the same as a public officer for purposes of an accounting upon improper handling of the association funds].) In this appeal the parties have not briefed or argued the issue of the standard to be applied in determining the liability of the individual defendants and we therefore do not reach that issue.

acted in good faith as a matter of law, and consequently they were not entitled to summary judgment in their favor.

The judgment is reversed and the cause is remanded for further proceedings in accordance with the views expressed in this opinion. (CERTIFIED FOR PUBLICATION.)

SPARKS, J.

I concur:

CARR, J.

I concur in the judgment and in much of the opinion of the court. I write separately to emphasize the State Bar's heavy burden on remand of proving a constitutionally permissible justification for using compelled membership dues to support political or ideological causes, even though such activities may be related in some way to the Bar's statutorily conferred powers. The forced subsidization of political or ideological causes inevitably involves additional First Amendment intrusions on the rights of objecting attorneys beyond those already countenanced by compelled membership in an integrated bar. Determination of constitutional adequacy of the governmental interest required to justify the additional intrusion (see *Ellis v. Railway Clerks* (1984) 466 U.S. 435 [80 L.Ed.2d 428, 447]) necessarily implicates the means employed to serve that interest. As stated in *Roberts v. United States Jaycees* (1984) \_\_\_ U.S. \_\_\_ [82 L.Ed.2d 462, 475] and reiterated in *Chicago Teachers Union v. Hudson* (1986) \_\_\_ U.S. \_\_\_ [89 L.Ed.2d 232, 245,



fn. 11], infringements on the right to associate for expressive purposes "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, *that cannot be achieved through means significantly less restrictive of associational freedoms.*" (Emphasis added.) Thus even when pursuing a legitimate governmental interest, the means chosen must be " 'least restrictive of freedom of belief and association' " (*Chicago Teachers Union*, supra, \_\_\_ U.S. at p. \_\_\_ [89 L.Ed.2d at p. 245, fn. 11], quoting *Elrod v. Burns* (1976) 427 U.S. 347, 363 [49 L.Ed.2d 547, 559]).

As does the court, I conclude that the record establishes beyond dispute that the use of compelled membership dues specifically to publicize the speeches and views of the State Bar President in 1982 and generally to engage in election campaigning in the guise of a program of public education is clearly a violation of the constitutional rights of objecting members. Furthermore, I agree that performance of the strictly regulatory functions of the bar does not violate the constitutional rights of any member. Beyond that, however, because of the inadequacy of the evidentiary record on appeal, I believe it is premature to speculate on the kinds of activities financed by compulsory bar dues which do not impermissibly infringe upon the First Amendment rights of objecting members.

PUGLIA, P.J.

3rd Civil No. 24124  
(County No. 307168)

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GORDNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DARO D. D. PEIPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANEY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Plaintiffs and Appellants,*

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE, GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; PHYLLIS M. HIX; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Defendants and Respondents.*

---

Reply Brief On The Merits  
Of Defendants/Respondents/Appellees

---



HERBERT M. ROSENTHAL  
TRUITT A. RICHEY, JR.  
MAGDALENE Y. O'ROURKE  
555 Franklin Street  
San Francisco, CA 94102  
(415) 561-8200

HUFSTEDLER, MILLER,  
CARLSON &  
BEARDSLEY  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
700 S. Flower Street  
Suite 1600  
Los Angeles, CA  
90017-4286  
(213) 629-4200

Attorneys for Defendants and Respondents

#### TABLE OF CONTENTS

	<u>Page(s)</u>
I. THERE IS NO NEED TO ALTER THE STATE BAR'S STATUS.....	1
A. The State Bar Is Well Established As A Public Entity.....	1
B. The Rules That Now Govern The State Bar Protect Plaintiffs .....	2
C. The Labor Cases Provide No Additional Protection.....	3
D. Decisions Concerning Other State Bar Associations Do Not Require This Court To Overrule Existing Authority.....	5
1. The Other Cases Are Factually Inapplicable .....	5
2. The Other Cases Do Not Mandate An <i>Abood</i> Analysis .....	6
3. The Other Cases Do Not Support The Relief Requested .....	8

II. THE NATURE OF THE ASSOCIATIONAL INTERESTS IS IMPORTANT.....	9
III. SUMMARY JUDGMENT WAS PROPERLY GRANTED.....	10
A. The State Bar Met Its Burden For Summary Judgment Under <i>Stanson</i> .....	10
B. Plaintiffs Have Failed To Allege The Challenged Activities Are Not Germane; Thus, Judgment For Defendants Was Proper ...	11
C. Summary Judgment Was Properly Granted On The Issue Of Personal Liability.....	14
IV. CONCLUSION .....	15

#### TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977).....	3, 4, 5, 11, 12
<i>Arrow v. Dow</i> , 544 F.Supp. 458 (D.N.M. 1982).....	8, 9
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. ___, 89 L.Ed.2d 232, 106 S.Ct. 1066 (1986) .....	4
<i>Chronicle Publishing Co. v. Superior Court</i> , 54 Cal.2d 548 (1960).....	2
<i>Common Cause v. Bolger</i> , 574 F.Supp. 672 (D.D.C. 1982), <i>aff'd mem.</i> , 461 U.S. 911, 77 L.Ed.2d 280, 103 S.Ct. 1888 (1983) .....	4, 5
<i>Ellis v. Brotherhood of Railway, Airline &amp; Steamship Clerks</i> , 466 U.S. 435, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984).....	13
<i>Erzinger v. Regents of University of California</i> , 137 Cal.App.3d 389 (1982) .....	10
<i>Estate of Supple</i> , 247 Cal.2d 410 (1966).....	14

<i>Gibson v. The Florida Bar</i> , 789 F.2d 1564 (11th Cir. 1986).....	5, 6, 8
<i>Hatch v. Draper</i> , 59 Cal.App.2d 411 (1943) .....	14
<i>Lathrop v. Donohue</i> , 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961).....	9
<i>Miller v. Commission On The Status Of Women</i> , 151 Cal.App.3d 693 (1984) .....	2, 4
<i>On Petition to Amend Rule 1 of Rules Governing the Bar</i> , 431 A.2d 521 (D.C. App. 1981) .....	7
<i>Regan v. Taxation with Representation of Washington</i> , 461 U.S. 540, 76 L.Ed.2d 129, 103 S.Ct. 1987 (1983) .....	4
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984) .....	9
<i>Romany v. Colegio de Abogados de Puerto Rico</i> , 742 F.2d 32 (1st Cir. 1984) .....	6, 7, 8
<i>Smith (C.L.) Co. v. Roger Duchamp</i> , 65 Cal.App.3d 735 (1977).....	12
<i>Stanson v. Mott</i> , 17 Cal.3d 206 (1976)....	2, 4, 10, 11, 14
<i>State Bar of California v. Superior Court</i> , 207 Cal. 326 (1929) .....	1

### Statutes

Bus. and Prof. Code §6013.5 .....	1
Bus. and Prof. Code § 6031(b) .....	11

### Treatises

Witkin, 6 Cal. Procedure, Proceedings Without Trial §280 (3d ed. 1985).....	12
---	----

Plaintiffs seek to have this Court overrule long-standing precedent and retroactively to deprive the individual defendants of the legal protection provided by that existing precedent. No good reason exists for such steps. Existing standards governing State Bar activities fully protect plaintiffs' rights, while preserving the ability of the State Bar to carry out the functions the Legislature has determined it should perform.

### I. THERE IS NO NEED TO ALTER THE STATE BAR'S STATUS

#### A. The State Bar is Well Established As A Public Entity

For over fifty years, the State Bar has functioned as a public entity, a status originally created by the Legislature, and expressly approved by this Court. *State Bar of California v. Superior Court*, 207 Cal. 326 (1929). The constitutional status of the State Bar has been established, and reconfirmed, by the electorate.

The functions of the State Bar are both explicitly and implicitly authorized by the Legislature: the statutory bounds of authority are set forth in the Business and Professions Code, and the programmatic authority is provided by the regular review by the Legislature as part of the budgetary process. The Legislature has also recognized the public nature of the State Bar by the appointment and selection of public members to sit on the Board of Governors as public officials along with those members selected by the lawyers of the state. See Bus. and Prof. Code § 6013.5; *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 566 (1960).

B. *The Rules That Now Govern The State Bar Protect Plaintiffs*

As a public entity, the State Bar must act within the scope of its legislative authorization. *Stanson v. Mott*, 17 Cal. 3d 206, (1976); *Miller v. Commission On The Status Of Women*, 151 Cal.App. 3d 693 (1984). The authorization defines the limits of the activity that the entity was created to perform, and prohibits activities that the Legislature did not determine to be within its purposes. Unlike a bar association created by a state court alone, and limited in its powers to those that that court could itself exercise and delegate, the California State Bar was created by the State Legislature. It can exercise the broader authority that that branch has properly delegated to it. Court created bar associations may be judicially restricted without concern as to separation of powers and the concomitant need for deference to legislative determinations. This State Bar is different; it is the creature of just such a series of determinations.<sup>1</sup>

Respondents ignore this fundamental distinction. While conceding that the activities of the State Bar are within its authorization, plaintiffs nonetheless wish this Court to change the treatment afforded to the State Bar and to impose on those who serve on its Board personal

<sup>1</sup> This fact distinguishes the California State Bar from the bars in most of the cases cited by plaintiffs. The bar associations in New Mexico, the District of Columbia, Wisconsin, New Hampshire and Florida were court created.

liability for undertaking activities within that authorization. Such actions are unnecessary to address the First Amendment issues raised in this case.

C. *The Labor Cases Provide No Additional Protection*

The cases on which plaintiffs rely, arising in the context of private labor unions, and applied by some courts to their state bars, establish rules to protect the First Amendment rights of individuals forced by government to give financial support to a private entity. In that context, the United States Supreme Court has required that the activities supported by those involuntary exactions be "germane" to the purpose for which the organization was formed. Other activities that the organization chooses to engage in are permissible, so long as they are financed in some other manner. See e.g., *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-236, 52 L.Ed. 2d 261, 97 S.Ct. 1782 (1977).

While activities that are called "political and ideological" may trigger constitutional inquiry, that label is not the key to determining whether the activity is permissible.

"Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can be properly attached to [the dissenters'] beliefs the critical constitutional inquiry." *Abood, supra*, 431 U.S. 209 at 232.

The test is whether the activity is germane; if it is, it may be financed by compelled exactions. See *Abood, supra*,



231 U.S. 209; *Chicago Teachers Union v. Hudson*, 475 U.S. \_\_\_, 89 L. Ed. 2d 232 at 239, 245, 106 S.Ct. 1066 (1986).

"As long as they act or promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, sub silentio." *Abood*, *supra*, 431 U.S. at 222, quoting opinion of Douglas, J. in *Street*.

This analysis provides no protection beyond that required by this Court's opinion in *Stanson*. The *Stanson* analysis of whether activities are constitutionally permissible begins with inquiring whether they are authorized, explicitly or implicitly. See 17 Cal.3d. at 213. As in the labor context, the label "political and ideological" is not determinative. The key issue remains proper authorization and relationship to a legitimate governmental interest.

In trying to limit certain activities of the Bar to what plaintiffs call its "governmental purposes" (i.e., regulation and admission of attorneys) plaintiffs ignore the fact that the legislature has properly authorized the State Bar to advance additional important governmental interests, and this decision has been implicitly endorsed by the voters. Under *Stanson*, *Miller*, and federal authorities (*Regan v. Taxation With Representation*, 461 U.S. 540, 76 L. Ed. 2d 129, 103 S.Ct. 1997 (1983); *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff'd mem.* 461 U.S. 911, 77 L. Ed. 2d 280, 103 S.Ct. 1883 (1983)), as well as under the union cases, compelled financing of the Bar's activities to further these interests is constitutional. The Legislature's decision to further these interests in this way

must be accorded deference. *Abood*, *supra*, 431 U.S. 209 at 277-78 & n.20.

D. *Decisions Concerning Other State Bar Associations Do Not Require This Court To Overrule Existing Authority*

1. *The Other Cases Are Factually Inapplicable*

The fact that the State Bar has properly been delegated certain powers by the California Legislature along with its other public characteristics distinguishes it from a number of other state bar associations. In the majority of the bar association cases on which plaintiffs rely, the associations were not formed or regulated by state legislatures but instead were created under the courts' auspices. The purview of those courts and their authorization to delegate power to a bar association are far more limited than that of a state legislature. Thus, the activities those associations can undertake are more limited than those delegated in California, and the range of topics the associations can address (i.e. germane to their purposes) is also far more limited.

However, within that delegation, authority is broadly construed. For example, in *Gibson v. The Florida Bar*, 789 F.2d 1564 (11th Cir. 1986), the court permitted the Florida bar to address all issues arising out of the expertise of lawyers concerning the courts from which the bar's powers came. 789 F.2d at 1569. That limited authorization alone would insulate from attack the activity of the State Bar specifically challenged here: the educational program on the independence of the judiciary. However, the State Bar's legislative authorization goes beyond the

*Gibson* limits. That authorization insulates from attack the categories of State Bar activity challenged categorically.

While the bar association in Puerto Rico was formed pursuant to legislation, the issue reviewed by the courts in evaluating that association's activities was how that statute has been interpreted, applied and acted upon in Puerto Rico. See *Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984). The bar's activities were characterized by the federal district court as "ideological and/or political activism of pervasive and continuous nature, totally unrelated to the stated legislative purposes for which it was created." *Id.* at 38. Thus, unlike the California State Bar, the Puerto Rico Bar committed *ultra vires* and illegal acts, necessitating a remedy.

## 2. *The Other Cases Do Not Mandate An Abood Analysis*

Plaintiffs also overstate the extent to which the union cases have been applied in cases dealing with bar associations in other jurisdictions. Close analysis shows that many were decided on other grounds and often turned on circumstances particular to the bar association at issue. None sanctioned the broad relief sought here.

For example, plaintiffs claim that the *Romany* court adopted an *Abood* analysis in evaluating the actions of the state bar in Puerto Rico. In fact, the Court of Appeal expressly refrained from performing that analysis. In vacating an injunction issued by the federal district court, without ruling on the merits, the Court of Appeal held that the district court should have abstained from addressing the case until the Puerto Rico Supreme Court

acted on plans submitted by the bar association to address concerns of dissenting members.

In *On Petition To Amend Rule 1 of Rules Governing The Bar*, 431 A.2d 521 (D.C. App. 1981), the Court simply addressed the effect of a referendum passed by the members of the court-created District of Columbia bar association limiting that association's activities. The Court's only reference to *Abood* was a comment that use of fees for one of the association's activities raised constitutional concerns. 431 A.2d at 525, n.4. Such *dicta* in a case concerning a bar association with far different authorization and characteristics is hardly authority for plaintiffs' attempt to have this Court abandon existing California law.

## 3. *The Other Cases Do Not Support The Relief Requested*

Plaintiffs request this court to enjoin broad categories of activity of the Bar, not because the activities are not germane, but because they are "political and ideological". Plaintiffs have also consistently sought to limit activities of the State Bar, not just its funding. See e.g., Plaintiffs' Complaint (seeking to enjoin financing of Bar activities and use of the name State Bar of California) O.F. at 5; Motion for Preliminary Injunction (seeking an injunction prohibiting *all* lobbying unrelated to admission and regulation of attorneys and all activity to advance political and ideological causes) O.F. at 197-198.

The cases cited do not support the relief plaintiffs seek. In *Abood*, the plaintiffs sought to have the agency shop provision in their collective bargaining agreement declared invalid and an injunction issued against the



imposition of sanctions for non-payment of dues. 431 U.S. at 213-214. They did not seek, and the Court did not order, an end to any of the Union's activities. The Court, in fact, expressly disapproved any such limitation, 431 U.S. at 235-236. See also *Gibson v. The Florida Bar*, 798 F.2d 1564, 1570 (11th Cir. 1986) (Florida bar may speak on any issue; only the use of compelled funds is prohibited); *Romany supra*, 742 F.2d 32, 41, n.10 ("To our knowledge, however, no court has held that compulsory bar dues may never be used to further any political or perhaps more accurately, "legislative" purposes."); *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M. 1982) (in striking support for certain lobbying activities, the Court refused to hold categorically that the bar is prohibited from lobbying). Thus, the broad relief plaintiffs seek has been explicitly rejected by the authorities on which they rely. Plaintiffs should not be permitted to use this litigation to disable the State Bar when there is no legal basis for the relief they seek.

## II. THE NATURE OF THE ASSOCIATIONAL INTEREST IS IMPORTANT

The United States Supreme Court has held that the nature of the "compelled" association determines the scope of protection granted *Roberts v. United States Jaycees*, 468 U.S. 609, 82 L.Ed. 2d 462, 104 S.Ct. 3244 (1984). That analysis is important to this case.

As the United States Supreme Court has recognized, the only association compelled by a mandatory bar is the payment of fees. *Lathrop v. Donohue*, 367 U.S. 820 at 843, 6 L. Ed. 2d 1191, 81 S.Ct. 1826 (1961). No member of the

State Bar is compelled to join in any activity or express any belief, merely to pay an annual fee.

Because the State Bar is not a voluntary organization, unlike the Jaycees, the views of its members are not directly implicated by any position it expresses as an organization. An individual lawyer is no more forced to be associated with any position taken by the State Bar than a bar owner forced to pay a license fee to the department responsible for alcoholic beverage control for the purpose of engaging in his livelihood is supposed by his customers to be in agreement with the positions of that department. Nor is any lawyer more closely associated with the State Bar's views than a university student is believed to agree with the use of his or her student fees in support of an activity. See *Erzinger v. Regents of University of California*, 137 Cal. App. 3d 389 (1982).<sup>2</sup> The lawyer, the student, and the bar owner must each pay a fee but none must make any other commitment to the group or its activities.

## III. SUMMARY JUDGMENT WAS PROPERLY GRANTED

### A. The State Bar Met Its Burden For Summary Judgment Under *Stanson*

Under *Stanson v. Mott*, 17 Cal.3d 206 (1976), governmental activities of a political nature are permissible so

<sup>2</sup> Although the objection in *Erzinger* was religious in nature, there is no principled reason to distinguish between the analysis of that First Amendment right and the First Amendment right asserted here.



long as they are properly authorized. In moving for summary judgment, the State Bar met its burden by demonstrating that the categories of challenged activity were within its legislative authorization. Plaintiffs do not dispute that authorization. See Plaintiffs' Opening Brief in the Court of Appeal at 19. There is no factual dispute and thus, judgment was appropriately granted.

The only additional requirement in *Stanson* is that government not interfere with the electoral process. Only the State Bar's independence of the judiciary program and the one inaugural speech of past bar president Anthony Murray challenged by plaintiffs could in any way be characterized as relating to an election. That these activities are within the bar's statutory authorization is clear; both relate to the court system and thus to advancement of the science of jurisprudence and improvement of administration of justice. It is also clear that neither distorted the electoral process.<sup>3</sup>

The record shows that the independence of the judiciary materials were available to bar associations only upon request. Those materials relate solely to the issue of the value of an independent judiciary, and did not discuss the merits of retention of any particular justice. The challenged speech was given to a group of bar leaders at Mr. Murray's inauguration and disseminated as such.

<sup>3</sup> Even if plaintiffs were correct in their characterization of this activity, however, the request for injunctive relief would be mooted by legislative action, See Bus. and Prof. Code § 6031(b). Thus this issue remains in the case only if personal liability is permitted.

Such an address to a limited audience hardly amounts to a distortion of the electoral process. As the Superior Court recognized, these activities were proper. They did not amount to a campaign requiring explicit authorization under *Stanson*.

B. *Plaintiffs Have Failed To Allege The Challenged Activities Are Not Germane; Thus, Judgment For Defendants Was Proper*

Even if the standards and requirements of the union cases are applied to the State Bar, plaintiffs have failed to state a claim under those cases. Under *Abood*, plaintiffs must allege that the activities challenged are not germane to the purposes for which the group was formed. Plaintiffs have failed to make such a claim. Rather they claim the State Bar's activities are unconstitutional *solely* because they are political and ideological. Such a claim is not cognizable under *Abood*, and was expressly rejected in that case. In *Abood*, plaintiffs alleged that they should not be required to finance *any* activity of the union, including its collective bargaining activities, as they considered all of its activities "inherently political." The Court held that no withstanding the political or ideological nature of the activity, if it was germane it could be financed.

The failure of plaintiffs to assert that the challenged activities are not germane is not an oversight. Plaintiffs have consistently claimed entitlement to relief solely on that basis. See e.g., Memorandum of Points and Authorities in Support for Motion for Temporary Restraining

Order (O.F. at 165-166); Memorandum in Support of Motion for Preliminary Injunction (O.F. at 193).<sup>4</sup>

Even if this Court were to now imply into plaintiffs' claims an assertion that the challenged activities are not germane to the State Bar's purposes, plaintiffs' action would still fail. For example, plaintiffs challenge all lobbying by the State Bar. The record on summary judgment showed that this program of the State Bar fulfills germane purposes. See O.F. at 255, 265. In making this showing, the Bar must be found to have met its burden of proof in the face of a categorical challenge. In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 80 L. Ed. 2d 428, 104 S.Ct. 1883 (1984), the United States Supreme Court, in ruling on the propriety of a summary judgment categorically evaluated challenges to union social activities, publications and its convention. For example, although various activities took place at the union's national convention, the Court upheld this entire activity upon a showing that the conference advanced a germane purpose. 466 U.S. at 442. The union was not required to prove that each activity at the conference was germane.

Thus plaintiffs' claim at a minimum must state the non-germane activities to which they object. While *Abood* protects plaintiffs from being required to disclose their

<sup>4</sup> This pleading failure is properly a basis for judgment here as the sufficiency of plaintiff's claim is in issue. See Witkin, 6 *California Procedure*, Proceedings Without Trial § 280 (3d ed. 1985). See also *Smith (C.L.) Co. v. Roger Duchamp*, 65 Cal.App. 3d 735, 745 (1977).

political or ideological position, specification of the activities they consider *non-germane* was not prohibited, as *Ellis* demonstrates.<sup>5</sup> To hold otherwise would impose an intolerable burden on both defendants and the courts, for in response to a sweeping challenge, the defendants would be forced to go forward with evidence of all of its activities over a span of years. Imposing such a burden on a governmental agency with a broad authorization and numerous activities would be contrary to public policy.

#### C. Summary Judgment Was Properly Granted On The Issue Of Personal Liability

*Stanton* establishes that personal liability may be imposed upon public officials only if a plaintiff proves that the officials failed to exercise good faith and due care. 17 Cal.3d at 226-27. The complaint in this action does not allege these crucial elements. In effect, plaintiffs seek relief on a theory of strict liability that *Stanton* expressly rejected. 17 Cal.3d at 210.

Plaintiffs attempt to avoid their inadequate pleadings by asserting that due care and good faith were made part of their claim because defendants raised these issues as affirmative defenses. This position is contrary to the case

<sup>5</sup> For example, plaintiffs might have alleged that only activity related to admission, regulation and discipline of lawyers (or some other scope of activity) is germane, without revealing their own political beliefs, but they have not done so. Instead, plaintiffs chose to allege the challenged activities are political or ideological. The case law establishes that this phrase is not a limitation on activity if the activity is germane.

law. In *Estate of Supple*, 247 Cal.2d 410, 416 (1966), in upholding a judgment on the pleadings, the court stated:

"appellant had ample opportunity to amend his pleading in conformity with respondents' answers but he declined to do so, with the result that he may not now contend that the defects in his pleading are cured by matters contained in said answers."

Throughout this litigation plaintiffs have declined proffered opportunities to amend their complaint. They are not now entitled to overturn a judgment based on a case that they refused to plead. See *Hatch v. Draper*, 59 Cal.App.2d 411 (1943) (upholding dismissal where plaintiff failed to amend and attempted to supply pleading deficiency through answer).

#### IV. CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

DATED: December 1, 1986.

Respectfully submitted,

HERBERT M. ROSENTHAL

TRUITT A. RICHEY, JR.

MAGDALENE Y. O'ROURKE

HUFSTEDLER, MILLER, CARLSON &  
BEARDSLEY

ROBERT S. THOMPSON

LAURIE D. ZELON

MARY E. HEALY

JUDITH R. STARR

By /s/ Robert S. Thompson

Robert S. Thompson

Attorneys for Defendants/Respondents/Appellees State Bar of California and certain individual Defendants

---



## C O P Y

IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA

EDDIE KELLER et al.,	)	
Plaintiffs and Appellants,	)	
	)	S.F.25050
v.	)	
	)	(Ct. of Appeal
THE STATE BAR OF CALI-	)	3 Civ. No. 24124)
FORNIA et al.,	)	(Super. Ct.
Defendants and Respondents.	)	No. 307168)
	)	(Filed FEB 23 1989)

This suit attacks the use of dues collected by the State Bar of California to finance lobbying, amicus curiae briefs and other activities, including election campaign activities, politically or ideologically objectionable to plaintiffs. Upon analysis of the constitutional status and legislative structure of the State Bar, we conclude that the State Bar may use dues to finance any activity, except election campaigning, which is germane to its statutory mission to promote "the improvement of the administration of justice." (Bus. & Prof. Code, § 6031, subd. (a)).<sup>1</sup>

Acting pursuant to its statutory authority, the State Bar for many years has lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education

<sup>1</sup> Unless otherwise indicated, all California statutory citations are to the Business and Professions Code.

programs. In 1982 the State Bar publicized the inaugural speech by its new president, Anthony Murray, in which he addressed the confirmation of appellate justices in the impending election. The State Bar subsequently disseminated material on that subject to local bar associations and other organizations.

All of these activities were financed primarily from membership dues, as are all bar activities except the bar examination. The State Bar levies membership dues pursuant to statutory authority (§ 6140) subject to a maximum limit set annually by the Legislature. Every attorney engaged in active practice in California is required to be a member of the bar (§§ 6125-6126) and to pay the dues assessed; a refusal to pay results in the suspension of membership (§ 6143), which deprives the attorney of the right to practice law in California (§ 6225).

Plaintiffs contend that the activities in question constitute the advancement of political and ideological causes, and cannot constitutionally be financed from mandatory dues. This is an issue of first impression in this state. Courts of some other jurisdictions have limited the use of bar dues, but there is no consensus concerning those limits.

When we set out to analyze the issue, we are confronted immediately with two competing paradigms. The State Bar argues that we should view it as a government agency, which may use revenues from any source for any purpose within the scope of its authority. Plaintiffs, on the other hand, argue that we should view the bar as a labor union or private association whose right to use dues money is restricted by constitutional principles.

We believe the governmental agency paradigm more closely fits the case of the California State Bar. Accordingly, we conclude the bar may use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation. By analogy to governmental agencies, however, the bar may not engage in election campaigns; thus certain of the activities in connection with the 1982 election exceeded its statutory power.

#### *I. Proceedings In This Action.*

Plaintiffs, 21 members of the State Bar, filed suit against the bar and its Board of Governors. Their complaint alleged that "[t]he State Bar of California, by and through its Board of Governors, has expended and will continue to expend substantial portions of the revenues derived from . . . mandatory dues payments to advance political and ideological causes, including, but not limited to:

"a. lobbying the California State Legislature on various matters . . . ;

"b. submitting briefs amicus curiae in various cases . . . ;

"c. financing meetings of the Conference of Delegates at which political and ideological causes are advanced . . . ;

"d. publicizing the political and ideological speeches of its president, Anthony M. Murray . . . ;

"e. financing a so-called 'public information' project designed to disseminate to the general public a particular ideology regarding judicial retention elections. . . ."

Plaintiffs then alleged that they do not subscribe to many of the political and ideological causes promoted by the bar, and object to the use of mandatory dues to advance any of the political and ideological views of the Board of Governors or the conference of delegates. They sought a declaration that defendants have violated their constitutional rights, an injunction restraining defendants from using bar dues or the name of the State Bar to advance political and ideological causes or beliefs, and an injunction compelling defendants to reimburse the bar for all funds expended for political and ideological purposes since September 12, 1982.

Plaintiffs attached a partial list of the bills which the bar has lobbied for or against, of the cases in which it has appeared as amicus curiae, and of resolutions adopted by the conference of delegates. They also attached a copy of Anthony Murray's inaugural address when he became president of the bar on September 12, 1982, a press release describing that address, and a later press release dated October 8. (Although the complaint referred to "speeches," the September 12 speech is apparently the only one at issue.) Finally, plaintiffs attached a copy of an educational packet entitled "The Case for an Independent Judiciary" distributed by the bar in October of 1982. The packet included a copy of Murray's inaugural address, a resolution of the Board of Governors, a sample speech, fact sheets on crime and conviction rates, judicial retention elections, and judicial performance, and suggestions for speech fora and media coverage.

Defendants answered, admitting that they have used dues to finance all of the described activities, but maintaining that such expenditures did not violate plaintiffs' rights.<sup>2</sup> Defendants then moved for summary judgment or adjudication of issues. In support, they submitted declarations which described the bar's legislative and amicus curiae program and asserted that the bar usually acted only in matters which affect the bar itself, the attorney-client relationship, or the administration of justice. In lobbying or filing amicus curiae briefs the bar's representatives purport to act only on behalf of the State Bar, and not to represent the views of each of its members. Plaintiffs filed a cross-motion for summary judgment, but submitted no declarations.

The trial court granted summary judgment for defendants, finding that the State Bar was a governmental agency authorized to do the acts in question. The court further found that the plaintiffs had failed to show that the individual defendants acted without due care or in bad faith.

The Court of Appeal reversed. The majority opinion by Justice Sparks divided State Bar activities into two categories. The first, regulatory activities, included the testing and admission of bar applicants and the disciplining of members. These activities, the Court of Appeal said, were akin to those of a governmental agency. The bar's administration-of-justice function - a function which included all the activities here challenged - it

<sup>2</sup> Defendant Phyllis Hix answered separately, asserting only the defense of failure to state a cause of action. She is not involved in this appeal.

found akin to the actions of a labor union. Such actions, it held, could be financed from mandatory dues only if the particular action in question served a state interest important enough to overcome the interference with dissenters' First Amendment rights.<sup>3</sup> Each lobbying activity, it said, and each amicus curiae brief, would have to be examined, with the State Bar bearing the burden to justify its action.

The Court of Appeal further held that the Murray speech and educational packet constituted election campaigning unauthorized by statute. It further found that the Board of Governors' approval of such unauthorized expenditures may subject its members to personal liability, and raised a triable issue concerning their good faith and exercise of due care. We granted the defendants' petition for review.

## II. *Structure And Function Of The State Bar.*<sup>4</sup>

Although the parties submitted much documentation in support of and in opposition to the respective motions, there is no real factual dispute about the State Bar and its activities. As we recently recounted, "[i]n 1927, the Legislature adopted the State Bar Act (Bus. & Prof. Code,

<sup>3</sup> Justice Puglia, concurring, maintained that the bar must prove that financing such activities from mandatory dues served a compelling state interest that cannot be achieved by less restrictive means.

<sup>4</sup> The discussion in this section is adapted from the Court of Appeal opinion of Justice Sparks.



§ 6000 et seq.) establishing 'what is known as an "integrated" bar, i.e., an organization of members of the legal profession of the state with a large measure of self-government, performing such functions as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice.' (1 Witkin, Cal. Procedure (1970 ed.) Attorneys, § 157, p. 168.)" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557.)<sup>5</sup> Thus, the State Bar is authorized to establish an examining committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill the requirements. . . ." (§ 6046, subds. (a), (c).) Under the board's auspices, local administrative committees may investigate complaints about the conduct of members and may thereafter forward reports and recommendations to the board for action. (§ 6043, subds. (a), (c).) After a hearing, the board "has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproof, public

<sup>5</sup> "An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments." (Note, First Amendment Proscriptions on the Integrated Bar: *Lathrop v. Donohue Re-Examined* (1980) 22 Ariz. L. Rev. 939, 941, fn. omitted.) It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. (See Winters, Bar Association Organization and Activities (1954) p. 1.)

or private, with such recommendation." (§ 6078.) "In those two areas, the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. In the area of admission to practice, an applicant is admitted only by order of the Supreme Court which, upon certification by the bar's examining committee that the applicant fulfills the admission requirements, 'may admit such applicant as an attorney at law in all the courts of this State. . . .' " (*Saleeby, supra*, at p. 557, citations omitted.) In addition to those duties, the State Bar enforces the law relating to the unlawful practice of law and illegal solicitation (§§ 6030, 6125-6131, 6150-6154), administers an arbitration system for fee disputes (§§ 6200-6206), maintains a client security fund (§ 6140.5) and engages in other similar matters relating to the legal profession.

In addition to these powers, the board is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." (§ 6031, subd. (a).)<sup>6</sup> This has been called the "laudable general purpose of the [State Bar] act." (*Herron v. The State Bar* (1931) 212 Cal. 196, 199.) The bar's general counsel has described this provision as "the springboard for State Bar activities."

<sup>6</sup> The board is also authorized by that subdivision to aid in "all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

(Hearing on Use of Mandatory State Bar Dues, Assem. Com. on Judiciary (Sept. 17, 1980) letter of Herbert M. Rosenthal, p. 111.) Some of the bar's actions undertaken pursuant to this section have been statutorily delineated; most have not. For example, the State Bar is mandated by statute to cooperate with and give assistance to the Commission on Judicial Performance (Gov. Code, § 68725), to assist the Law Revision Commission (Gov. Code, § 8287), and to evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record. (Gov. Code, § 12011.5.) In aid of all of its powers, the State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes." (§ 6001, subd. (g).)

To carry out its functions, the State Bar is governed by a Board of Governors of 22 members, 16 of whom are members of the State Bar and 6 of whom are nonattorneys appointed by the Governor of the state with approval of the Senate. (§§ 6010, 6011, 6013.5.) Fifteen of the attorney members of the board are elected by the members of the State Bar from geographical areas established by the Legislature, and one member is elected by the board of directors of the California Young Lawyers Association. (§§ 6012, 6013, 6013.4.) The board elects the officers of the State Bar. (§§ 6021-6024.) The State Bar has established a conference of delegates, which consists of representatives of voluntary local and special bar associations. The conference meets once a year to consider proposals, many of which are intended for legislative action. The board has also established committees or sections open to members of the bar interested in particular areas of the law and which advise the board in those areas.

The bar employs attorneys who represent it in disciplinary actions and other litigation, including the present case. On direction of the Board of Governors, the attorneys file briefs amicus curiae in litigation affecting the bar or its members. The bar also employs lobbyists to present the position of the board to the Legislature and state agencies.

### III. *The State Bar, For The Purpose Of Expenditure Of Dues, Is Analogous To A Governmental Agency.*

The issue we face today came before the United States Supreme Court in *Lathrop v. Donohue* (1961) 367 U.S. 820. Plaintiffs in that case challenged the constitutionality of the Wisconsin integrated bar. Relying on cases upholding the constitutionality of legislation authorizing the union shop (*International Association of Machinists v. Street* (1961) 367 U.S. 740; *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225), all justices agreed that compulsory membership in the bar was constitutional. (See *Levine v. Heffernon* (7th Cir. 1988) \_\_ F.2d \_\_.) Justice Brennan, writing for four justices, declined to reach questions concerning the use of mandatory dues because the plaintiffs had not objected to any specific expenditure. The remaining five justices agreed that the issue of use of dues was properly before the court, but disagreed on the result. Justice Harlan, joined by Justice Frankfurter, treated the bar association as analogous to a governmental agency and dues as analogous to license fees, and found no constitutional infirmity in the use of dues for authorized purposes. (See *Lathrop, supra*, 367 U.S. at pp. 864-865.) The member, he points out, is not required affirmatively to profess or



assent to any belief, and the bar, in its lobbying activities, did not claim to present the views of all of its members. (See *id.* at pp. 860-861.) Justice Whittaker asserted briefly that practicing law was a special privilege, which could be conditioned on payment of bar dues. Justices Douglas and Black dissented, referring to their opinions in *International Association of Machinists v. Street*, *supra*, 367 U.S. 740, where they said that the use of union dues to finance political activities violated the members' First Amendment rights. Thus as pointed out in a subsequent case, all *Lathrop* decided was that the constitutional issues concerning use of bar dues should be decided; it did not decide those issues. (*Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 233 fn. 29.)

Consequently the treatment of bar dues remains an unsettled question. We recognize certain similarities between the bar and a labor union which would support imposing upon the bar those restrictions which limit union expenditures. The bar is an association composed of members of a particular profession. It is governed by a board, the majority of whom are elected by the members. It holds annual meetings. Although much of its activity is done to promote the public interest, it also regularly acts on behalf of the special interest of its members.

The California Constitution, statutes, and judicial decisions, however, appear to envision the bar as a governmental agency. The State Bar Act of 1927, codified in sections 6000-6087, provides in section 6001 that "[t]he State Bar of California is a public corporation." This declaration attained constitutional status with the enactment in 1966 of article VI, section 9 of the state Constitution, which asserts that "[t]he State Bar of California is a

public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record."

What is a "public corporation"? When the State Bar Act was enacted in 1927, this term was defined by a statute, since repealed: a public corporation is one "formed or organized for the government of a portion of the state." (Former Civ. Code, § 284.) Construing that statute, a 1917 decision said that "[P]ublic corporations . . . are those corporations formed for political and governmental purposes and vested with political and governmental powers." (*Bettencourt v. Industrial Acc. Com.* (1917) 175 Cal. 559, 561.)

In *State Bar of California v. Superior Court* (1929) 207 Cal. 323, it was contended that the State Bar could not be a public corporation because it was not created to govern "a portion of the state," and that the State Bar Act was thus an unconstitutional attempt to create a private corporation.<sup>7</sup> The court responded that the statute defining a public corporation could not limit the Legislature from enacting subsequent statutes creating public corporations for purposes other than the government of a portion of the state. It added that the Legislature has

---

<sup>7</sup> The parties and the court appeared to assume that "a portion of the state" meant a geographical portion. One amicus curiae in the present case, however, contends that "portion" can be defined in other ways, and that the State Bar does govern a portion of the state, namely the attorneys of California in the practice of their profession.



frequently created public corporations which did not have the function of governing a portion of the state, citing examples of reclamation districts, levee districts, and irrigation districts.<sup>8</sup>

It was further argued in *State Bar v. Superior Court*, *supra*, 207 Cal. 323 that the State Bar must be considered a private corporation in view of its membership, functions, purpose, and its independence from public regulation and control. The court responded that the regulation of the practice of law is within the police power of the state – a close issue in 1929, but not today – and referred to legislative and judicial regulation as sufficient to classify the bar as a public corporation.

This decision does not answer the question whether a public corporation is necessarily a governmental agency. But it is significant that all other public corporations in California – water districts, school districts, reclamation districts, etc. – are clearly considered governmental entities. Conversely, no labor union or professional association is classified as a public corporation.

Apart from its denomination as a public corporation, other aspects of the bar show its governmental nature. The Board of Governors includes six public members

---

<sup>8</sup> These are districts which perform services for landowners within a geographic area. Although their structures vary (many having been created by special statute), generally they are governed by an elected board. The electors may consist of all residents, or of landowners, and the latter may vote in proportion to the value of their holdings. Such districts generally have the power to levy taxes.

School districts represent another type of nonmunicipal public corporation.

appointed by the Governor, who are not members of the bar. (§ 6013.5.) The presence of "consumer representatives" on state regulatory boards is a common phenomenon, but no law permits the Governor to appoint nonmembers as officers of a labor union or private association. Section 6008 declares that "[a]ll property of the State Bar is hereby declared to be held for essential public and governmental purposes" and is exempt from taxation. Section 6026.5 requires public meetings; a similar requirement applies to governmental regulatory boards but not to unions or private associations. Section 6001, subdivision (g) states that "[n]o law of this State restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies . . . shall be applicable to the State Bar, unless the Legislature expressly so declares" – an unnecessary enactment unless laws governing the exercise of powers of state public bodies or state agencies would otherwise apply to the bar. In *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548 we said that this last provision demonstrates "[t]hat the Legislature considered the State Bar as at least akin to a state public body or agency" (p. 565), and held that officers of the bar could claim the confidential communication privilege given public officers under former Code of Civil Procedure section 1881.<sup>9</sup> A later decision, *Engel v.*

---

<sup>9</sup> Former Code of Civil Procedure section 1881, subdivision 5, provided that "[a] public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." This statute has been superseded by Evidence Code sections 1040-1042.

McClosky (1979) 92 Cal.App.3d 870, applied the tort claims act (Gov. Code, § 810 et seq.) to the State Bar.<sup>10</sup>

A recent amendment to section 6031 further indicates that the Legislature views the bar as a governmental agency. Subdivision (b), added by the amendment, provides that "the board [of governors] shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice [of an appellate court] . . . without prior review and statutory authorization by the Legislature." If the State Bar is considered a private association, the constitutionality of this statute is suspect. It is a content-defined prohibition of a particular form of political speech by a named organization, imposed, apparently, because the Legislature objected to bar attempts to influence the voters. It would be difficult to justify a prohibition on political speech by a private association, especially one enacted because the speaker is thought too knowledgeable and influential with the voters. If the bar is thought of as a governmental agency, on the other hand, section 6031, subdivision (b), merely defines the scope of authority of the agency, and raises no constitutional question.

<sup>10</sup> The tort claims act applies to "public entities," defined as including "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." The Law Revision Commission Comment states that "[t]his definition is intended to include every kind of independent political or governmental entity in the state."

As we noted earlier, the Court of Appeal divided the state bar's function into two parts. It held that in regulating the admission of members to the bar, and disciplining current members, the bar performed a governmental function, but in all other activities it was analogous to a private association. We reject this holding on two grounds. The first is simply that the reason we view the bar as analogous to a governmental agency is not only that it performs a governmental function, but that the state Constitution, statutes, and court decisions treat it as a governmental agency. Those enactments and decisions do not differentiate according to the specific activity performed by the bar. Thus the bar is a public corporation, whether it is disciplining members or filing amicus curiae briefs; it is exempt from taxation and immune from tort liability both when examining applicants for admission and when lobbying the Legislature. Its stature under the California Constitution, its structure, and its government are the same for all its functions. We conclude that however classified, it must be regarded as a single entity.

Second, the Court of Appeal's dichotomy, viewing lobbying and amicus curiae activity as that of a private association, would frustrate the legislative purpose underlying the bar's authority to promote the administration of justice. Under the Court of Appeal's view, whenever the bar proposed to advise the Legislature or the courts of its views on a matter, it would first have to engage in the three-step analysis set out in *Ellis v. Railway Clerks* (1984) 466 U.S. 435. The bar must first determine whether the activity is germane to the purpose for which the bar has compulsory membership. Next, if the activity is germane, it must decide whether it inflicts an



infringement of the dissenters' First Amendment rights beyond that inflicted by compulsory membership alone. Finally, if there is an infringement of First Amendment rights, it must determine whether there is a state interest sufficient to justify that infringement.<sup>11</sup>

Such a procedure would be an extraordinary burden. Hundreds of bills come before each legislative session; cases affecting the administration of justice arise frequently. Bar action, to be effective, must take place before the legislative session ends or the case is submitted. The bar has neither time nor money to undertake a bill-by-bill, case-by-case *Ellis* analysis, nor can it accept the risk

---

<sup>11</sup> Serious conceptual difficulties arise in applying this three-step analysis to the State Bar. The first step asks whether an activity is germane to the purpose of compulsory membership. We know the functions of the State Bar – they are set out in statute – but the concurring and dissenting opinion impliedly suggests that the purpose of compulsory membership may be a more limited one, the delivery of quality legal services and the improvement of the legal profession. (*Post*, p. \_\_\_\_ [typed opn. at p. 26].) It does not explain this distinction.

The second step inquires whether the activity imposes a burden on First Amendment rights additional to that imposed by compulsory membership. The cases, however, do not elucidate which uses of dues impose burdens subsumed in compulsory membership, and which impose additional burdens.

The last step examines whether there is a state interest sufficient to justify the additional burden on objectors' rights. We have no guidance on what interest will meet this criterion: the Michigan Supreme Court, which considered this matter twice, was unable to reach agreement. (*Falk v. State Bar of Michigan* (1981) 305 N.W.2d 201 [Falk I]; *Falk v. State Bar of Michigan* (1983) 342 N.W.2d 504 [Falk II], cert. denied (1984) 469 U.S. 925.)

of litigation every time it decides to lobby a bill or brief a case.<sup>12</sup> Thus the likely result of the Court of Appeal's approach would be to deter the bar from conducting *any* lobbying or filing *any* amicus curiae briefs. If those activities promote the administration of justice by providing the Legislature and the courts with expert legal assistance, as we believe, an approach which would deter all lobbying and amicus curiae activity would frustrate the state interest underlying the establishment of an integrated bar.

Furthermore, the one area where the Legislature has indicated displeasure with the bar's activity concerns election campaigning. Yet if the bar is viewed as a private association, it would have a constitutional right to participate fully in political campaigns. (See *Abood v. Detroit Board of Education*, *supra*, (1977) 431 U.S. 209, 235-236; cf. *Buckley v. Valeo* (1976) 424 U.S. 1.) No explicit authorization would be necessary; any prohibition on such activity, such as section 6031, subdivision (b), would be unconstitutional.<sup>13</sup> Again, such a result would seem inconsistent with legislative intent.

---

<sup>12</sup> The situation is not analogous to a labor union, which serves a much more limited function and constituency. The function of the bar is not limited to promoting the self-interest of its members, but extends to promoting the improved administration of justice. Thus the bar is properly concerned with legislation other than just that which affect the earnings and working conditions of attorneys.

<sup>13</sup> The bar as a private association would be subject to limitations on what election activities it could finance from dues. (Cf. *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435.) But actions which do not require expenditure of money, such as the endorsement of candidates, could not be challenged.



We recognize that most of the cases from other jurisdictions which have addressed the subject of integrated bar dues have applied the labor union analogy to the bar. (*Gibson v. The Florida Bar* (11th Cir. 1986) 798 F.2d 1564; *Schneider v. Colegio de Abogados de Puerto Rico* (D.P.R. 1983) 565 F.Supp. 963, *revd in part in Romany v. Colegio de Abogados de P.R.* (1st Cir. 1984) 742 F.2d 32, on remand *Schneider v. Colegio de Abogados de Puerto Rico* (D.P.R. 1988) \_\_\_ F.Supp. \_\_\_; *Arrow v. Dow* (D.N.M. 1982) 544 F. Supp. 458 [New Mexico Bar]; *The Florida bar* (Fla. 1983) 439 So.2d 213; *Falk I*, *supra*, 305 N.W.2d 201; *Falk II*, *supra*, 342 N.W.2d 504; *Reynolds v. State Bar of Montana* (1983) 660 P.2d 581.)<sup>14</sup> None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation. Consequently, while we are uncertain whether the courts have correctly described the

<sup>14</sup> The one exception is *Sams v. Olah* (1969) 225 Ga. 497. The Georgia Supreme Court rejected a contention that the integrated bar of Georgia was unconstitutional because it spent funds for political purposes. Declaring that the bar was not a labor union (p. 506), the court concluded that the only issue was whether the fees were spent for the purposes for which the bar was created. (P. 507.) "The promotion of political issues and candidates is not within the purposes of the State Bar. . . . The fostering of legislation and the promotion of ideologies may, or may not, be consonant with the purposes of the State Bar, according to the nature of the legislation and the ideologies." (P. 508.)

bar associations at issue in the cited cases<sup>15</sup> we remain confident that the California State Bar is best described as analogous to a governmental agency.<sup>16</sup>

<sup>15</sup> Only one of these cases gives any reason for applying the labor union paradigm to an integrated bar instead of viewing it as a governmental agency. *Gibson v. The Florida Bar*, *supra*, 789 F.2d 1564, 1568, quoted Justice Powell's concurring opinion in *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209, 259, footnote 13, where he said that " 'the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.' " (789 F.2d at p. 1568, quoting *Abood v. Detroit Board of Education*, *supra* 431 U.S. 209, 259, fn. 13.)

We find the argument unpersuasive. A city government is representative of a segment of the state's population which, by reason of geography, shares common interests; a bar association is representative of a segment which, by reason of career, shares common interests. Each, we think, is a governmental agency, which to fulfill its statutory function must be able to spend money on controversial matters.

<sup>16</sup> In *Lathrop v. Donohue*, *supra*, 367 U.S. 820, 864-865, Justice Harlan, supporting the use of dues to finance lobbying by the Wisconsin bar, wrote: "I had supposed it beyond doubt that a state legislature could set up a staff or commission to recommend changes in the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel. . . . It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer. . . . In this circumstance, wherein lies the unconstitutionality of what Wisconsin has done? Does the Constitution forbid the payment of some part of the Constitutional

(Continued on following page)

#### IV. *The Consequences Of Viewing The State Bar As A Governmental Agency.*

If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority.

Two Court of Appeal decisions illustrate the point. In *Erzinger v. Regents of University of California* (1982) 137 Cal.App.3d 389, certiorari denied, 462 U.S. 1133, students at the University of California objected that the compulsory student registration fees included a fee for health services which included abortions. The Court of Appeal, noting that the Board of Regents is a governmental agency, treated the fee as equivalent to a tax, and held that one could not refuse to pay a tax because of ideological or religious objections to the use of the money.

---

(Continued from previous page)

license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things? [¶] I end as I began. It is exceedingly regrettable that such specious contentions . . . should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality."

In *Miller v. California Com. on Status of Women* (1984) 151 Cal.App.3d 693, appeal dismissed, 469 U.S. 806, plaintiffs attacked the commission's expenditures incurred in lobbying for the enactment of the equal rights amendment. The Legislature responded by enacting Government Code section 8246, which expressly authorized such lobbying.<sup>17</sup> The Court of Appeal found the statute controlling. Rejecting the claim that commission lobbying infringed the rights of dissenters, it wrote that the claim failed to distinguish between the government's addition of its own voice and its silencing of others. " 'That government must regulate expressive activity with an even hand if it regulates such activity at all does not mean that government must be ideologically "neutral." ' " (P. 700, quoting Tribe, *American Constitutional Law* (1978) p. 588.) Government may not compel citizens to express a particular viewpoint, nor delegate to nongovernmental entities the power to extract funds to support political and ideological activity not directly related to the entity's purpose. *Ibid.*, citing *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209.) " 'But none of this means that government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication.' " (*Ibid.*, quoting Tribe, *op. cit. supra*, p. 590.) "If the government . . . cannot appoint a commission to speak on the topic [of the status

---

<sup>17</sup> Section 8246 provides in subdivision (a) that "the commission is expressly authorized to inform the Legislature of its position on any legislative proposal pending before the Legislature and to urge the introduction of legislative proposals."



of women] without implicating plaintiffs' First Amendment rights it may not address any other 'controversial' topics. If the government cannot address controversial topics it cannot govern." (P. 701.)<sup>18</sup>

We conclude that the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority. The concurring and dissenting opinion disputes this conclusion, arguing that even if the bar is a governmental agency its use of dues should be subject to restrictions hitherto imposed only on labor unions and other private associations. But no precedent supports the imposition of such restrictions on a governmental agency. Moreover, as we have previously explained (*ante*, p. \_\_\_\_ [typed opn. at p. 20]), applying the labor union test to the bar would impose upon the bar the massive burden of analyzing all proposed activities under vague and uncertain standards designed for organizations of quite different purpose and structure, and would probably discourage the bar from carrying out its statutory functions.<sup>19</sup>

<sup>18</sup> Other cases approving lobbying by governmental agencies include *Stanson v. Mott* (1976) 17 Cal. 3d 206, 218; *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318; *Powell v. City & County of S.F.* (1944) 62 Cal.App. 2d 291.

<sup>19</sup> Under the concurring and dissenting opinion, the State Bar would have the worst of both the private and the governmental worlds. It would be subject to constitutional restrictions on its use of dues, as are private associations, but would not enjoy the constitutional rights of private associations to endorse candidates and engage in political campaigns.

Having decided that the bar may use dues for any authorized purpose, we next inquire into the scope of its authority. As previously noted, section 6031, subdivision (a) authorizes the bar to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." In the context of lobbying and amicus curiae activities, this language should be read broadly. Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems." (*Falk I, supra*, 305 N.W. 201, 231-232 (opn. of Williams, J.) fns. omitted)<sup>20</sup>

<sup>20</sup> The same reasoning applies to lobbying before administrative agencies, and to the filing of amicus curiae briefs. Agencies and courts, in their interpretation of laws, also benefit from the collective advice of the bar.



Thus we do not distinguish between proposed legislation of substantive character and that which aims only at procedural changes. Substantive legislation has procedural effects, as, for example, when a change in tort law affects the number of cases settled and the number going to trial. And even if the proposed bill seems at first glance to relate entirely to substantive matters unrelated to the practice of law, the advice of expert practitioners could still be crucial; an example might be a bill concerning community property which has consequences, unforeseen by its author, upon estate planning or federal tax liability.

We conclude that a bill-by-bill, case-by-case, review of bar lobbying and amicus curiae briefs is unnecessary and unworkable. We do not impose such scrutiny on lobbying and litigating by other governmental agencies. The Legislature is well aware of the bar's activities, and that the bar's authority for those activities derives from section 6031. Knowing these matters, the Legislature has annually approved bar dues, some of which go to support lobbying and amicus curiae briefs, and has amended section 6031 to prohibit one specific activity – the rating of appellate judges. We infer that the Legislature essentially approves a broad construction of the statute which would permit the bar's existing activities.

Holding a conference of delegates also falls within the bar's authority. (Cf. *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435, 448, 455-456 (union conventions).) Plaintiffs, however, assert that some of the resolutions debated and passed by the conference fall beyond the boundary. The examples they cite, however, do not support this assertion; all but one relate to proposed changes in California

law and that one relates to federal court jurisdiction, a subject which affects the practice of law in California.

The bar's actions in connection with the 1982 election present a different issue. We have no doubt that the bar's actions related to the administration of justice. Indeed few matters bear as directly upon the administration of justice as the standards for the appointment and retention of judges. In *Stanson v. Mott*, *supra*, 17 Cal.3d 206, however, we set out a special rule limiting state agency participation in election campaigns. We there stated that absent "clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign." (17 Cal.3d at pp. 209-210.) Informational or education expenditures, on the other hand, require no such explicit authorization, for an agency has "implicit power to make 'reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment. . . .'" (P. 220, quoting *Citizens to Protect Pub. Funds v. Board of Education* (N.J. 1953) 98 A.2d 673, 676.)

We recognized that "[f]requently . . . the line between unauthorized campaign expenditures and authorized informational activities is not so clear. . . . In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." (P. 222, fn. omitted.)

The present case is one of those we anticipated in *Stanson v. Mott*, *supra*, 17 Cal.3d 206. Anthony Murray's inaugural speech was delivered about three months

before the 1982 election, and clearly referred to that election. (The speech itself, of course, cost the State Bar nothing; the issue concerns its being publicized through press release and educational materials.) Some of its language is quite strident; he denounces the "idiotic cries of . . . self-appointed vigilantes . . . [and] unscrupulous politicians." Some portions of the speech are restrained and educational in tone: he describes the history of the concept of judicial independence from the failed impeachment of Justice Samuel Chase to the present day and the role and philosophy of the bar,<sup>21</sup> and presents statistics concerning this court's review of criminal cases. The speech did not mention any justice by name, or urge the retention of any or all of the justices.<sup>22</sup> The bar's subsequent press release simply describes the speech, highlighting Murray's assertion that "the only legitimate basis for refusing to retain or for recalling a justice is a showing of incapacity or misconduct in office."

---

<sup>21</sup> Murray asserts a proposition which counsel for the State Bar have not chosen to argue here – that it is the proper role and indeed duty of the bar to defend the judiciary from unjustified attack because judges are inhibited from election campaigning themselves. *Amici curiae* adopt the argument and refers us to the American Bar Association Code of Professional Responsibility, Ethical Consideration, EC 8-6, which states that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."

<sup>22</sup> As *Stanson, supra*, 17 Cal.3d 206, explains, it is not essential that the publication expressly exhort the voters to vote one way or another. *Stanson* notes:

(Continued on following page)

The educational packet, sent to local bar associations and other interested groups, contained Murray's speech, a sample speech entitled "The Case for an Independent Judiciary" (a quite restrained and philosophical exposition), sample letters to organizations which might provide a speech forum, and a sample press release. It also included fact sheets on crime and conviction rates, judicial selection and retention, and judicial performance and removal criteria. It concluded with quotations concerning

---

(Continued from previous page)

"In 35 Ops.Cal.Atty.Gen. 112 (1960), for example, the trustees of the Madera Union High School District placed a full page advertisement in a general circulation newspaper one day before a school bond election. The advertisement did not explicitly urge voters to 'Vote Yes' on the bond issue, but stated in large letters that 'A CLASSROOM EMERGENCY EXISTS NOW AT MADERA UNION HIGH SCHOOL' and listed a number of reasons why additional funds were needed by the school district. The county counsel requested the Attorney General's opinion as to whether public funds could be used to pay for the advertisement.

"After reviewing the relevant judicial authorities, the Attorney General concluded that although the advertisement did not explicitly urge a 'Yes' vote and did disclose relevant factual information, the use of public funds to pay for the advertisement would nonetheless be improper. The opinion reasoned: 'Viewed as a whole, the advertisement cannot properly be held to be a publication primarily designed to educate the voters as to the activities carried on by or the conditions of the Schools of the district. . . . The style, tenor and timing of the advertisement placed by the board of trustees points plainly to the conclusion that the publication was designed primarily for the purpose of influencing the voters at the forthcoming school bond election.' (35 Ops. Cal.Atty.Gen. 112,114.)" (17 Cal.3d at p. 222, fn. 8.)



judicial independence from Hamilton, Madison, Jefferson, and others.<sup>23</sup>

The bar may properly act to promote the independence of the judiciary; such conduct falls clearly within its statutory charge to advance the science of jurisprudence and improve the administration of justice. In the present case, however, the nature and timing of the 1982 publication (see *Stanson v. Mott*, *supra*, 17 Cal.3d 206, 222), indicate that it is a form of prohibited election campaigning. The material was distributed approximately one month before an election in which six justices of this court came before the voters for confirmation. It is the kind of material which a state election committee distributes to local committees to aid them in the campaign. Its style and tenor is appropriate to that end; it is basically informative and factual, but without claim of impartiality, and includes such practical tools as a form letter to groups which might host a speaker. While intended to educate the reader because its authors believed an informed campaigner would be a more effective campaigner, its primary purpose, we believe, was to assist in the election campaign on behalf of the justices.

---

<sup>23</sup> In distributing these materials, the bar acted pursuant to a unanimous resolution of the Board of Governors declaring "that it is the duty of the legal profession and all of its members to . . . [t]ake steps to maintain and promote understanding and confidence, among the citizens of this state and the nation, in the need for an independent judiciary. . . ." The resolution further declared "that the State Bar should take necessary and appropriate steps to support these principles and to aid the profession and the public in understanding them."

We conclude that in preparing and distributing this material, the State Bar exceeded its statutory authority.

In view of the absence of any prior authority in California construing section 6031, and the obvious difficulty of the issue, we cannot fairly hold the governors personally liable for the 1982 expenditures. The bar has long been concerned with promoting and defending the independence of the judiciary. It formally endorsed the initiative which established the present system of judicial retention elections in place of partisan elections.<sup>24</sup> It has frequently debated and proposed measures for merit selection and life tenure for judges. As we noted earlier, it is charged with an ethical obligation to defend the judiciary from unfair attack. (See fn. 22, *ante*.) Under these circumstances, we conclude as a matter of law that the Board of Governors could reasonably believe that it had the authority to take action in opposition to what it perceived to be an attack on an independent judiciary. Under *Stanson v. Mott*, *supra*, 17 Cal.3d 206, 226-227, such a reasonable belief precludes personal liability.

#### V. Conclusion.

In light of the structure of the California State Bar, as imposed in the state Constitution, statutes, and court

---

<sup>24</sup> The present system was an outgrowth of an earlier proposal for reform of judicial elections in Los Angeles County. That proposal was drafted by the bar, which lobbied for passage of the constitutional amendment through the Legislature and then campaigned unsuccessfully for its approval by the voters. (See Smith, *The California Method of Selecting Judges* (1951) 3 Stan.L.Rev. 571.)



decisions, we conclude that the activities of the bar should be governed by the standards applicable to governmental agencies. Thus lobbying, amicus curiae briefs, and the annual conference of delegates can be financed through dues as presently done. The bar, however, may not engage in election campaigning; its activities in publicizing Murray's 1982 speech and distributing the educational packet violated that prohibition. In light of past uncertainty concerning the scope of the bar's authority, however, we hold that the governors are not personally liable for the unauthorized expenditures.

The judgment of the Court of Appeal is reversed, and the case remanded for further proceedings consistent with this opinion.

BROUSSARD, J.

WE CONCUR:

MOSK, J.  
ARGUELLES, J.  
CLINTON W. WHITE\*

\*Presiding Justice of the Court of Appeal, First Appellate District, Division Three, sitting under assignment by the Chairperson of the Judicial Council

C O P Y

EDDIE KELLER *et al.* v. STATE BAR OF CALIFORNIA  
*et al.*

S.F. 25050

CONCURRING AND DISSENTING  
OPINION BY KAUFMAN, J.

I concur in the majority's conclusions that the State Bar is precluded from engaging in election campaigning and that the bar's publication of president-elect Anthony Murray's 1982 speech and distribution of the educational package violated that prohibition. I further concur in the majority's holding that the bar governors are not personally liable for reimbursement of the unauthorized electioneering expenditures. I respectfully dissent, however, from its holding that, because of the State Bar's status as a governmental agency, its expenditure of objecting members' mandatory dues for political or ideological causes is lawful and exempt from constitutional scrutiny.

DISCUSSION

The majority opinion considers the California State Bar to be "best described as analogous to a governmental agency." If viewed as a governmental agency, the majority declares, the bar is not subject to First Amendment constraints when spending its objecting members' mandatory dues because a governmental agency may expend tax revenues to perform its statutory duties without restrictions and "the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial." (Maj. opn. at p. [typed opn. at pp. 23-24].) Therefore, the majority concludes, the bar may

properly spend funds for "all matters pertaining to the advancement of the administration of justice," (Bus. & Prof. Code, § 6130, subd. (a).), which it defines expansively as virtually anything having to do with law, except electioneering.

While it correctly characterizes the State Bar as a governmental agency, the majority opinion is incorrect in concluding that because the State Bar is a governmental agency its expenditure of objecting members' dues is exempt from First Amendment scrutiny. That error is grounded in the majority's failure to recognize the significance of a crucial fact: The California State Bar derives its funds from membership dues which all attorneys, and only attorneys, in California are required by law to pay as a condition precedent to pursuing their livelihood – the practice of law – in the state. It is this fact – compelled membership in a professional association with mandatory dues as a condition to practice the profession of law – that subjects the State Bar to the constitutional scrutiny from which most other governmental agencies may be exempt. In an unbroken line of cases, the United States Supreme Court has held that, when a state compels membership in an association as a condition precedent to earning a livelihood, the association's objecting members' First Amendment rights are infringed by its expenditure of mandatory membership dues for philosophical, political or ideological causes.

Resistance to coerced association and intolerance of government-enforced support of philosophical, religious, political or ideological causes animated the founding of our nation and the drafting of its Constitution. Thomas Jefferson wrote in 1779 "that to compel a man to furnish

contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." (Brant, James Madison: The Nationalist (1948) p. 354.) Madison warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases. . . ." (II Writings of James Madison (Hunt ed. 1901) p. 186.)

These principles have guided the United States Supreme Court's First Amendment jurisprudence. "If an association is compelled, the individual should not . . . be required to finance the promotion of causes with which he disagrees." (*Machinists v. Street* (1961) 367 U.S. 740, 776 [Douglas, J., conc.].) "[T]he First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other." (Id. at p. 791 [Black, J., dis.].) First Amendment principles "prohibit the [state] from requiring any [individual] to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." (*Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 235.) Individuals can "be required to become 'members' of [an association], but those who object[] [can]not be burdened with any part of the [association's] expenditures in support of political or ideological causes." (*Ellis v. Railway Clerks* (1984) 466 U.S. 435, 447.) "The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of [the dissenters'] interest in not being compelled to subsidize the propagation of political or ideological views that they



oppose is clear." (*Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, [106 S.Ct. 1066, 1075].) Indeed, *Hudson* emphasized this point by relying on the principles expressed by Thomas Jefferson and James Madison quoted above. (*Id.* at p. \_\_\_, fn. 15 [106 S.Ct. at p. 1075]; see also *Abood* at pp. 234-235, fn. 31; *Street* at p. 778, fn. 4 [Douglas, J., conc.].)

The United States Supreme Court has thus steadfastly invalidated coerced association to the extent it enforces financial support of political and ideological causes to which a member objects. In a series of decisions, the court has prohibited unions from expending the mandatory dues of objecting members for such causes not sufficiently related to the governmental interests justifying coerced association. (*Ellis*, *supra*, 466 U.S. at p. 447.) As I explain below, these same First Amendment principles also preclude the California State Bar from spending its objecting members' mandatory dues for controversial causes not sufficiently related to the governmental interests that justify compulsory bar membership.

In this connection it is essential to keep in mind that except as to expenditures for electioneering, the principal question in this case is not whether the State Bar may lawfully make the expenditures at issue, but whether in doing so it may utilize the compulsory dues of objecting members and thereby compel those members to support causes they oppose. Simply concluding, as the majority does, that the State Bar is authorized to make the expenditures to which plaintiffs object does not resolve the constitutional question of whether plaintiffs' First Amendment rights are infringed by the expenditure of

their compulsory dues for political and ideological activities to which they object.

# I. *Expenditure of Dues for Political and Ideological Activities Violates the First Amendment*

## A. *Historical Origins*

In *Railway Employees' v. Hanson* (1956) 351 U.S. 225, the United States Supreme Court first considered a challenge to a "union shop" agreement.<sup>1</sup> Nonunion employees complained that such an agreement, by forcing them "into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought," violated their First Amendment rights. (*Id.* at p. 236.) Because the challenge was directed to the facial validity of the Railway Labor Act, the court confined its inquiry to the statute, holding that Congress, acting under its broad commerce clause powers,<sup>2</sup> could reasonably determine that industrial peace required all employees who benefited from union representation to support financially "the work of the union in the realm of collective bargaining." (*Id.* at p. 235.) The court specifically noted, however, that

<sup>1</sup> A union shop agreement is a provision in a collectively bargained agreement which requires employees, within a certain period of time after being hired, to join and maintain membership in the union. (See § 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh.)

<sup>2</sup> The court noted that the commerce clause Power "often has the quality of police regulations." *Hanson*, *supra*, 351 U.S. at p. 235.)



First Amendment problems would arise if " 'assessments' are in fact imposed for purposes not germane to collective bargaining." (Ibid.) Thus, the court indicated the possibility of a First Amendment challenge in situations where a union, under a union shop agreement, required objecting employees to support financially activities not germane to the union's collective bargaining duties. (See *id.* at p. 238.)

Just such a challenge was presented in *Machinists v. Street*, *supra*, 367 U.S. 740, 749. In *Street*, the plaintiff alleged that the union, which required him to pay dues under a union shop agreement, used these funds "to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed." (367 U.S. at p. 744.) The court chose, however, to avoid the constitutional question, basing its decision instead on an interpretation of the relevant statute. It held that Congress, in enacting the union shop provision (§ 2, Eleventh, of the Railway Labor Act), never intended to grant the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. (*Id.* at p. 768.)

#### B. *The Court's Consideration of Integrated Bar Associations*

In a companion case to *Street*, *supra*, 367 U.S. 740 (*Lathrop v. Donohue* (1960) 367 U.S. 820), the United States Supreme Court considered a challenge by members of the Wisconsin State Bar to an order of the Wisconsin Supreme Court requiring all attorneys to become bar members. The plaintiff, a Wisconsin attorney, had paid

his dues under protest and sued for a refund, claiming that the state bar used his dues to engage in political activities which he opposed and that, by coercing him to join the bar and support its political activities, the Wisconsin Supreme Court order integrating the state bar was unconstitutional.

The United States Supreme Court concluded that by integrating the bar the Wisconsin Legislature and Supreme Court had advanced the public interest " 'by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice' " (*Lathrop*, *supra*, at pp. 831-832). Relying on its analysis in *Hanson*, *supra*, 351 U.S. 225, the court stated that "the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (*Lathrop* at p. 843.) Several points underlying this holding have particular significance to the instant case.

First, it is significant that the court considered the regulatory function of the Wisconsin State Bar to be the primary justification for the compulsory membership requirement. (See Schneyer, *The Incoherence of the Unified Bar Concept* (1983) Am.B.Found.Res.J. 1, 54-55 ["Basically, Brennan saw the state bar as a public agency created to fund and administer regulatory or governmental programs."].) Second, the court employed language reminiscent of its commerce clause decisions. This suggests that

the state's regulatory or police power, similar in scope to Congress' commerce clause power (see ante, fn. 2), was the actual source of authority underlying integration of the bar. (Accord *Herron v. State Bar* (1944) 24 Cal.2d 53, 64.) Both these points emphasize the court's identification of the justifying governmental interest as the advancement of the delivery of quality legal services to the public. Finally, the court implicitly balanced the state's interest in regulating the legal profession with what, in that case, appeared to be a minimal intrusion into the attorneys' associational and speech rights.<sup>3</sup> (Schneyer, *The Incoherence of the Unified Bar Concept*, supra, at p. 51.)

---

<sup>3</sup> The court emphasized that "the bulk of State Bar activities" were involved in raising educational and ethical standards, with the ultimate objective of improving the quality of legal services available to the public. (*Lathrop*, supra, 367 U.S. 820, 843.) Thus, the court found that the allocation of bar resources to political activities was minimal. More recent decisions have established, however, that even slight interference with an individual's speech or associational rights violates the First Amendment. (*Chicago Teachers Union v. Hudson*, supra, 475 U.S. at p. \_\_\_\_ [106 S.Ct. at p. 1075]; *Ellis v. Railway Clerks*, supra, 466 U.S. at pp. 442-444.)

Further, the court indicated that because the membership requirement was limited "to the compulsory payment of reasonable annual dues," it considered insignificant any infringement upon members' associational rights. (*Lathrop*, supra, 367 U.S. at p. 843.) Again, recent cases establish that the First Amendment protects an individual's rights not to associate and not to speak – the so-called "negative speech rights" – just

(Continued on following page)

The court managed to avoid the plaintiff's claim that the bar's use of his mandatory dues to support political activities violated the First Amendment by finding the record insufficiently developed in this regard. (*Lathrop*, supra, 367 U.S. 820, 845-846.) It is significant to the case before us, however, that only four of the justices deemed the constitutional issue not ripe for adjudication (Chief Justice Warren and Associate Justices Brennan, Clark and Stewart), while five justices considered the issue to be squarely presented. Of these five, two found the use of objecting members' mandatory dues for political purposes to be constitutional (id. at p. 865 [Harlan, J., conc. in judgment, joined by Frankfurter, J.]), two found such use to be unconstitutional (id. at p. 871 [Black, J., dis.]; id. at pp. 884-885 [Douglas, J., dis.]), and one considered the practice of law to be a "special privilege" and thus not a "right" protected by the First Amendment.<sup>4</sup> (Id. at p. 865 [Whittaker, J., conc. in result].) Moreover, because the *Lathrop* majority explicitly detailed the particular facts it

---

(Continued from previous page)

as it protects an individual's rights to associate and to speak. (*Pacific Gas & Electric Co. v. Public Utilities Commission of California* (1986) 475 U.S. 1, 10-11; *Roberts v. United States Jaycees* (1980) 468 U.S. 609, 623; *Abood*, supra, 431 U.S. at pp. 234-235; see also *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624.)

<sup>4</sup> The United States Supreme Court has since "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.'" (*Sugarman v. Dougall* (1973) 413 U.S. 634, 644 [quoting *Graham v. Richardson* (1971) 403 U.S. 365, 374].)



would have needed to address the First Amendment question (*id.* at pp. 846-847), it appears that, had the record been sufficiently developed in these regards, the entire court would have agreed that the First Amendment issue was squarely presented. Indeed, the court subsequently characterized *Lathrop* by stating that "[t]he only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached." (*Abood*, *supra*, 431 U.S. at p. 233, fn. 29.)

Thus, at the very least, *Lathrop*, *supra*, 367 U.S. 820, supports the proposition that use of the mandatory bar dues of objecting members for political and ideological purposes presents a clear constitutional question. Subsequent cases have established that even the generalized allegations found wanting in *Lathrop* are sufficient to raise the First Amendment challenge. (See *Abood*, *supra*, 431 U.S. at p. 241; *Arrow v. Dow* (10th Cir. 1981) 636 F.2d 287, 289.)

The majority in this case avoids the constitutional issue by labeling the State Bar as a "governmental agency," and concluding that a "governmental agency may use *unrestricted* revenue . . . for any purposes within its authority." (Maj. opn., at p. [typed opn. at p. 24], *italics added.*) What the majority fails to recognize, however, is that under federal constitutional law the use of objecting members' mandatory dues for political or ideological purposes is *not unrestricted*. *Abood*, *supra*, 431 U.S. 209, and its progeny make this abundantly clear as I shall further explain in the following section.

Further, the majority's effort to distinguish the California State Bar from the integrated bars of other states,

including Wisconsin, whose courts have uniformly applied the *Abood* holding to analyze the question of use of mandatory bar dues (see post, pp. — - — [typed opn., pp. 15-16]), is unpersuasive. Simply saying that none of these states' bars "rest upon a constitutional and statutory structure comparable to that of the California State Bar" does not explain why such a distinction renders the California State Bar immune from the First Amendment constraints, while the Wisconsin Bar is not. The United States Supreme Court's decision in *Lathrop*, *supra*, 367 U.S. 820, clearly supports the proposition that an integrated bar's use of mandatory dues of objecting members for political or ideological causes is subject to constitutional scrutiny. It was not until the decision in *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209, however, that the court explicated the First Amendment issue.

### C. The Constitutional Issue

In *Abood*, the United States Supreme Court first addressed the constitutional issues raised when a union, or, as I would hold, an integrated state bar, spends objecting members' dues for political or ideological purposes. Because the freedom to associate for the purpose of advancing ideas and beliefs is protected by the First Amendment, the court reasoned that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment." (*Abood*, 431 U.S. at p. 234.) Recognizing further that the First Amendment is violated when one is "compelled to make, rather than prohibited from making, contributions for political purposes" (*id.*), the court concluded that the



Constitution "prohibit[s the state] from requiring [an individual] to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." (Id. at p. 235.)<sup>5</sup>

Thus, *Abood* holds that the First Amendment prohibits the state from coercing an individual, by threatening the loss of his livelihood, to financially support ideological or political causes to which he objects. (*Abood*, supra, 431 U.S. 209, 235-236; *Ellis*, supra, 466 U.S. 435, 455; cf. *Wooley v. Maynard* (1977) 430 U.S. 705, 715; *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, supra, 475 U.S. at p. 9; *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, 100.) The event that triggers the constitutional inquiry is the state's authorizing, or compelling, support of political or ideological causes through the coercive threat of the loss of one's livelihood for refusing to contribute. Attorneys are forced

<sup>5</sup> In *DeMille v. American Federation of Radio Artists* (1947) 31 Cal.2d 139, this court rejected the plaintiff's contention that union expenditure of a special assessment for a political cause with which he disagreed was compelled speech and thus violated the First Amendment. We distinguished the political use of compelled union fees from the flag salute cases (e.g. *West Virginia State Board of Education v. Barnette*, supra, 319 U.S. 624) by reasoning that the "member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest." (*DeMille*, supra, at p. 149.) We held that once the member pays any dues or assessments to the association, they "become the property of the association and any severable or individual interest therein ceases upon such payment." (*Ibid.*) *Abood*, supra, 431 U.S. 209, *Ellis*, supra, 466 U.S. 435 and *Hudson*, supra, 475 U.S. 292 have since invalidated this line of reasoning.

to join the State Bar as a condition precedent to practicing law in the state, just as employees are forced to support unions under provisions for union and agency shops. While the state's need to regulate the legal profession may justify such coercion, it does not justify compulsory financial support of political or ideological causes by objecting members.

Thus, when the State Bar spends a portion of compulsory membership dues on political or ideological causes rather than on regulatory functions, the identical First Amendment concerns which faced the United States Supreme Court in *Abood*, supra, 431 U.S. 209, are presented. Recognizing these concerns, every other court that has considered First Amendment challenges to state bar political expenditures has applied the *Abood* analysis. (See *Gibson v. The Florida Bar* (11th Cir. 1986) 798 F.2d 1564, 1568; *Falk v. State Bar of Michigan* (1981 411 Mich. 63, 106 [305 N.W.2d 201, 213] [*Falk I*]; *Falk v. State Bar of Michigan* (1983) 418 Mich. 270, 290-91 [342 N.W.2d 504, 410] [*Falk II*], cert. den. (1984) 469 U.S. 925; *Reynolds v. State Bar of Montana* (Mont. 1983) 660 P.2d 581, 581-582 [without citing *Abood*, court ordered refund to objecting members of dues spent for political activities]; *Petition of Chapman* (1986) 128 N.H. 24, 35-36 [509 A.2d 753, 755] [N.H. State Bar]; *Arrow v. Dow* (D.N.M. 1982) 544 F.Supp. 458, 460 [N.M. State Bar]; *Schneider v. Colegio de Abogados de P.R.* (D.P.R. 1983) 565 F.Supp. 963, 965, on remand, (D.P.R. 1988) 682 F.Supp. 674, 683-684 [bar association of P.R.]; *Hollar v. Government of the Virgin*

Islands (3d Cir. 1988) 857 F.2d 163, 170 [bar association of the Virgin Islands].)<sup>6</sup>

I would join the jurisdictions that apply *Abood's* constitutional analysis. Indeed, as the cited decisions clearly demonstrate, federal constitutional law compels that analysis. As I explain in the next section, simply labeling the State Bar as a "governmental agency" does not the majority to the contrary notwithstanding, except this case from First Amendment analysis.

## II. *Governmental Expenditure of Mandatory Dues Is Not Equivalent to Governmental Expenditure of Taxes*

The majority errs further in broadly stating – without benefit of authority – that a "governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority." (Maj. opn. at p. [typed opn. at p. 23].) I agree that such a rule would apply to revenue derived from general taxes. It is well established that taxpayers may be required to financially support governmental programs and messages to

<sup>6</sup> In a pre-*Abood* constitutional challenge to state bar expenditures for political and ideological causes (*Sams v. Olah* (1969) 225 Ga. 497), the Georgia Supreme Court quoted its holding in *Machinists v. Street* (1961) 217 Ga. 351 [122 S.E.2d 220], after remand in 367 U.S. 740: "[A] labor union might be enjoined from using its funds for political purposes against the wish of an individual member, [because] this was a use of funds for purposes other than collective bargaining, the legitimate purpose of the union. . . ." (*Sams*, supra, 225 Ga. at p. 508.) Thus the *Sams* court applied essentially the same reasoning the United States Supreme Court later used in *Abood*, supra, 431 U.S. 209.

which they are ideologically or conscientiously opposed. (See, e.g., *Graves v. Commissioner* (6th Cir. 1978) 579 F.2d 392, 392 [Quakers must pay income tax despite contravention of religious principles]; *Autenreith v. Cullen* (9th Cir. 1969) 418 F.2d 586, 588 [conscientious objector must pay income tax despite use of taxes to fund warfare]; *Crowe v. Commissioner* (8th Cir. 1968) 396 F.2d 766, 767 [citizen must pay income tax despite disagreement with use of taxes to support federal welfare system]; *United States v. Lee* (1982) 455 U.S. 252, 262 [Amish employer must pay social security tax despite contravention of religious principles].)

Similarly, I perceive no First Amendment violation in the expenditure of revenues from license fees for purposes substantially related to regulation of the particular profession or industry. Indeed, this court has validated the State Bar Act "as a regulatory measure under the police power . . . and . . . held that the reasonable expenses necessary to pay the costs of enforcement of the act . . . may be imposed upon the membership in the form of fees or dues. [Citations.]" (*Herron v. State Bar*, supra, 24 Cal.2d at p. 64.)

We face a far different situation, however, when we consider the expenditure by a state agency of dues paid by a small and limited segment of the public, imposed as a condition precedent to the exercise of a profession, and expended for purposes not related to regulation of the profession. The Court of Appeal decisions to which the majority points do not support its conclusion that the source of revenue is "immaterial" to a determination of the propriety of its expenditure. To the contrary, when the revenue in question is derived from mandatory dues as a condition precedent to the practice of a profession, the ends to which the money is devoted are highly material.



In *Miller v. California Commission on the Status of Women* (1984) 151 Cal.App.3d 693, the plaintiffs filed a "taxpayers' action for declaratory and injunctive relief seeking to abolish the commission. . . ." (Id. at pp. 695-696.) Without explicitly denoting the source of funds, the opinion refers throughout to the commission's use of "public resources," and in the predecessor case (*Miller v. Miller* (1978) 87 Cal.App.3d 762), to the use of "public funds," to fund the commission's expenses. Because of the absence of any contrary indication in either of the *Miller* opinions or in Government Code section 8240 et seq. authorizing formation of the commission, one can only deduce that the "public resources" or "public funds" referred to in the *Miller* decisions were general taxes. Consequently, *Miller* stands only for the proposition that a governmental agency may spend funds derived from general taxes for any purposes within its authority, a concept well supported by precedent, but unchallenged in, and inapposite to, the case before us.

The other decision to which the majority refers, *Erzinger v. Regents of University of California* (1982) 137 Cal.App.3d 389, involved a claim by university students that their right to the free exercise of religion was violated by a portion of their mandatory registration fee being used to provide abortions, abortion counseling and abortion referrals through the student health services. The Court of Appeal analogized the payment of student registration fees to the payment of taxes, and applied a well settled line of authority holding that the "right to free exercise of religion does not justify refusal to pay taxes. . . ." (Id. at p. 393 [citing *Autenreith v. Cullen*, supra, 418 F.2d 586].) Whether or not the Court of Appeal

correctly analogized student registration fees to general taxes is debatable, but in any event this court is not bound by *Erzinger*. More importantly, I do not consider the issues in the two cases sufficiently similar to make *Erzinger* applicable to the instant case.

The students in *Erzinger* charged the University was interfering with their right to free exercise of religion, not their speech and associational rights. Unlike plaintiffs here, the *Erzinger* plaintiffs were not compelled to become members in an association, the threshold event which triggers First Amendment scrutiny of governmental action for violation of the constitutionally protected speech and associational rights. (See ante, p. [typed opn., p. 15].) Furthermore, the registration fees at issue in *Erzinger* were used strictly to finance health care within the paying group, as compared to the instant case where the State Bar fees at issue are allegedly used in part to promote political and ideological causes of concern to the general public.

Moreover, a student denied admission for failure to pay registration fees has more options, and is injured far less, than an attorney denied the right to practice law for failure to pay bar dues. It is obviously a greater hardship for the attorney to move to a different state and qualify there for admission to practice than it is for a student to enroll in a different college or university. Consistent with this distinction, courts have recognized that the pursuit of one's livelihood, be it the practice of law or some other profession, is a fundamental right. (*Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 281; *Anton*



v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 823.)<sup>7</sup>

Further, the purported analogy between taxes and mandatory dues has been questioned, and rejected, by courts and commentators alike. In *Young Americans for Freedom v. Gorton* (Wash. 1978) 588 P.2d 195, for example, the plaintiffs sought to prevent the Washington State Attorney General from using general tax revenues to finance the filing of amicus briefs in support of ideas to which the plaintiff taxpayers objected. The plaintiffs argued that taxes are the equivalent of mandatory union dues and thus the attorney general's use of taxes to fund advocacy of ideas was proscribed by *Abood*, supra, 431 U.S. 209. The Washington Supreme Court found "no viable merit" to the plaintiff's contention that general taxes and union dues are interchangeable sources of revenue for First Amendment purposes. (Id. at p. 200.)

Federal courts, in considering constitutional challenges to the use of integrated bar membership dues for political activities, have consistently rejected the claim that they have no jurisdiction by operation of statutes

<sup>7</sup> In determining that a physician's hospital privileges are a vested fundamental right, the court held that a primary consideration was whether the interest in question " 'directly relates to the pursuit of [one's] livelihood.' " (*Anton v. San Antonio Community Hospital*, supra 19 Cal.3d at p. 823 [quoting *Edwards v. Fresno Community Hosp.* (1974) 38 Cal.App.3d 702, 705].) By this standard, the practice of law is clearly a fundamental vested right. This conclusion is further supported by the United States Supreme Court's determination that the right to practice law is fundamental and thus protected by the privileges and immunities clause. (*Supreme Court of New Hampshire v. Piper*, supra, 470 U.S. at p. 281.)

that prevent the federal courts from considering questions concerning the proper use of state taxes. (*Levine v. Supreme Court of Wisconsin* (W.D. Wis. 1988) 679 F.Supp. 1478, 1488-1489 overruled on other grounds in *Levine v. Heffernan* (7th Cir. 1988) \_\_\_ F.2d \_\_\_ [1988 U.S. App. LEXIS 17722] [Tax Injunction Act, 28 U.S.C. § 1341]; *Schneider v. Colegio de Abogados de Puerto Rico* (D.P.R. 1982) 546 F.Supp. 1251, 1275 [Butler Act, 48 U.S.C. § 872].)

In *Abood*, supra, 431 U.S. 209, Justice Powell observed that "[c]ompelled support of a private association [by payment of dues was] fundamentally different from compelled support of government [by payment of taxes because] government is representative of the people . . . [while] a union . . . is representative only of one segment of the population, with certain common interests." (*Abood* at p. 259, fn. 13 [Powell, J., conc.].)

Commentators have offered various reasons to distinguish taxes from mandatory dues for First Amendment purposes. Some have suggested that, as a practical matter, the sheer number of taxpayers and the complexity of government financing preclude making the *Abood* analysis applicable to objecting taxpayers. (Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association* (1983) 36 Rutgers L.Rev. 3, 24, fn. 125 [citing *United States v. Lee*, supra, 455 U.S. at pp. 259-261].) Others explain the distinction by arguing that the impact on objecting taxpayers from government "ideological" expenditures is less intrusive than the impact of controversial expenditures on dissenting union fees payors. (Tribe, *American Constitutional Law* (2d ed. 1988) § 12.4, fn. 14, p. 808.)

Whether or not one finds these arguments persuasive, one point is clear; a majority of the justices in *Lathrop v. Donohue*, supra, 367 U.S. 820, found that the use of mandatory state bar dues for philosophical, political or ideological causes implicates First Amendment concerns and principles. (See ante, pp. "\_\_\_-\_\_\_" [typed opn., pp. 11-12].) Labelling the State Bar a "governmental agency" cannot divert us from the First Amendment inquiry which *Lathrop*, supra, 367 U.S. 820, and *Abood*, supra, 431 U.S. 209, direct.

The majority engages in pure sophistry when it states that "no precedent supports the imposition of such [First Amendment] restrictions on a governmental agency." (Maj. opn., p. [typed opn., p. 26].) What the majority refuses to recognize is that most of the cases involving constitutional challenges to, and limitations on, the use of mandatory bar dues involved *governmental agencies* – state bar associations. (See, e.g., *Schneider v. Colegio de Abogados de P.R.*, supra, 546 F.Supp. at p. 1264 [applying governmental immunity to Puerto Rican bar association because in disciplinary proceedings the bar acts in a prosecutorial capacity pursuant to statute]; *Falk v. State Bar of Michigan*, supra, 305 N.W.2d at p. 203 [State of Michigan acts through "combined efforts of the Michigan Supreme Court, Legislature and State Bar"]; *Petition of Chapman*, supra, 509 A.2d at p. 758 [New Hampshire Supreme Court "retains continuing supervisory authority over the [N.H. Bar] Association and its activities"]; *Arrow v. Dow*, supra, 544 F.Supp. at p. 459 ["control of dues [is] subject to the supervision of the New Mexico Supreme Court"]; *Sams v. Olah*, supra, 225 Ga. at p. 501 [Georgia State Bar is an "administrative arm of the [Georgia

Supreme Court"]; *Reynolds v. State Bar of Montana*, supra, 660 P.2d at p. 582 [Weber, J., dis.] [Montana Supreme Court "has the power to control the organization of the State Bar"]; *Hollar v. Government of Virgin Islands*, supra, 857 F.2d at p. 167 [Virgin Islands Bar Association acts as prosecutor for the district court in attorney disciplinary proceedings].) These cases indisputably subjected state bars to the First Amendment scrutiny mandated by *Abood*. (Ante, pp. 15-16.) None of these cases analyzed the constitutional issue in terms of whether the relevant state bar was a governmental agency or private association. Instead, these cases reflect the recognition that *compelled membership* subjects an association whether private or governmental – to First Amendment constraints.

Indeed, while the majority agrees that "all *Lathrop* decided was that the *constitutional-issues* concerning the use of bar dues *should be decided*; it did not decide those issues" (maj. opn. at p. [typed opn., p. 13], italics added [citing *Abood*, supra, 431 U.S. at p. 233 fn. 29]), the majority fails to reconcile its position with that of the United States Supreme Court: Since "the [Wisconsin] State Bar is a public and not a private agency" (*Lathrop v. Donohue* (1960) 10 Wis.2d 230, 242), the United States Supreme Court obviously considered public, or governmental, agencies to be subject to First Amendment scrutiny.

Moreover, other jurisdictions have recognized that the First Amendment constrains governmental agencies which compel membership. In *Good v. Associated Students of University of Washington* (Wash. 1975) 542 P.2d 762, for example, the Washington Supreme Court held



that "the state, through the university, may not *compel membership* in an association, such as the [Associated Students of the University of Washington because] . . . [t]hat association expends funds for *political and economic causes to which the dissenters object* and promotes and espouses political, social and economic philosophies which the dissenters find repugnant to their own views. *There is no room in the First Amendment for such absolute compulsory support, advocacy and representation.*" (Id. at p. 768, italics added.) In *Galda v. Bloustein* (3d Cir. 1982) 686 F.2d 159 the plaintiffs objected to a governmental agency, the State University of New Jersey (Rutgers), requiring students to pay refundable fees to support the New Jersey Public Interest Research Group (PIRG). Acknowledging Rutgers' authority to levy and collect mandatory student fees, the court nevertheless held that *Abood* prevented it from requiring student support of PIRG if the plaintiffs could prove that PIRG supported political or ideological causes to which they objected.

Thus, the majority's assertion that subjecting governmental agencies to First Amendment restrictions is unprecedented does not withstand scrutiny. On the contrary, the weight of authority supports the view that when a state requires membership in a governmental entity, the authorized use of compelled dues for political or ideological purposes to which its members object is subject to constitutional constraints.<sup>8</sup>

<sup>8</sup> The majority asserts that the position advocated in this concurring and dissenting opinion would subject the State Bar to the "worst of both the private and the governmental

(Continued on following page)

The issue left unresolved by *Lathrop*, whether the First Amendment is violated by the State Bar's use of mandatory dues for political or ideological causes to which some members object, has subsequently been addressed by analogy in the United States Supreme Court's union decisions. (See *Ellis*, supra, 466 U.S. 435; *Hudson*, supra, 475 U.S. 292.) These cases establish the constitutional standard by which State Bar expenditures must be scrutinized.

### III. *The Constitutionality of Expending Objecting Members' Dues for Political and Ideological Causes*

#### A. *The Constitutional Standard*

A threshold issue precedent to any First Amendment analysis is whether the State Bar is legally authorized to

(Continued from previous page)

worlds" by, on the one hand, subjecting it to constitutional restrictions in its use of dues and, on the other hand, precluding it as a state agency from endorsing political candidates and engaging in political campaigns. (Maj. opn., fn. 19.)

What this assertion fails to recognize is that if an association derives the benefit of the force of government to compel individuals to join the association and pay membership dues, then that association should be limited in its use of those dues and that indeed such limitation is commanded by the First Amendment to the United States Constitution. Such indifference to the First Amendment rights of the 115,000 members of the California State Bar is remarkable stemming as it does from acknowledged champions of First Amendment liberties. By focusing on the distinction between private and governmental entities, the majority's approach gives the State Bar the best of both worlds, and State Bar members the worst of both worlds. In contrast, by focusing on the distinction between compulsory and voluntary association, the concurring and dissenting opinion strikes a balance between the rights of the State Bar and its members.



make the expenditures to which plaintiffs object. Indeed, if the objectionable expenditures are precluded by statute or decisional law, there is no need for further inquiry. (*Ellis*, *supra*, 466 U.S. at pp. 444-445.)

The State Bar is, as the majority point out, statutorily authorized to expend funds for a broad range of activities.<sup>9</sup> (See maj. opn., ante, at p. [typed opn., p. 27].) However, it is only if, or when, an expenditure is *authorized* by law that we are required to analyze the constitutionality of the expenditure of objecting members' mandatory dues under the First Amendment. (*Ellis*, *supra*, at p. 447.)

The majority has properly identified *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435 as the authority explicating the First Amendment analysis of expenditure by a compulsory association – either union or bar association – of objecting members' dues for political or ideological causes. *Ellis* mandates a three-step analysis to determine

---

<sup>9</sup> In addition to the statutory provisions authorizing the bar to perform various regulatory functions, the Board of Governors is authorized to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." (Gov. Code, § 6031, subd. (a).)

As the majority point out, however, the State Bar as a governmental agency is precluded from participating in election campaigns. (*Stanson v. Mott* (1976) 17 Cal.3d 206; see maj. opn., ante, at p. [typed opn. at p. 33].)

which political and ideological activities may be funded by mandatory dues over members' objections.

First, it must be determined whether the activity is "germane" to the purpose which justified compulsory membership in the bar in the first place. (*Id.* at p. 447.) The governmental interest in the delivery of quality legal services to the public and the improvement of the legal profession have been held sufficient to justify the infringement of First Amendment rights that may occur when attorneys are required to become bar members. (*Lathrop v. Donohue*, *supra*, 367 U.S. at p. 843; see text ante at pp. [typed opn., pp. 8-9].) When bar activities serve this interest,<sup>10</sup> or when expenditures are "necessarily or reasonably incurred" to finance activities that serve this interest, then such expenditures are considered "germane." (*Ellis*, *supra*, 466 U.S. 435 at p. 448.)

If an expenditure serves the state's interest in the delivery of quality legal services to the public and the improvement of the legal profession, the second step of the *Ellis* analysis requires that we determine "whether these expenses involve additional interference with the First Amendment interests of objecting employees. . . ."

---

<sup>10</sup> The majority apparently equates the statutory *functions* of the State Bar with the state interests that may justify interference with members' associational rights. (See maj. opn. fn. 11.) It is hornbook law, however, that not all statutes rise to a level that justify state interference with basic constitutional rights. (See Tribe, *American Constitutional Law*, *supra*, § 12.2, p. 792.) As stated above, I adopt the United States Supreme Court's explication of the state interests which justify compulsory bar membership because I consider it to be authoritative.

(Id. at p. 456.) Finally, if the activities funded by the questioned expenditure do involve additional interference with First Amendment rights, we must determine "whether they are nonetheless adequately supported by a governmental interest." (Ibid.)

Thus, if a bar activity impinges upon First Amendment interests beyond the interference inherent in compulsory membership in the first instance, the bar must identify a governmental interest that justifies such additional interference. For example, the investigation of charges of attorney misconduct or the administration of the bar examination do not appear to interfere with members' First Amendment interests. Lobbying the Legislature for approval of the bar's proposed budget, however, would seem to implicate bar members' First Amendment rights. Nonetheless, such activity would appear justified by the governmental purposes underlying the requirement of compulsory membership in the State Bar. Without an adequate budget, the bar would be unable to conduct activities designed to advance the delivery of quality legal services to the public and to improve the legal profession.

I do not suggest the governmental interest that may justify additional interference with objecting bar members' First Amendment rights is *limited* to advancing the delivery of quality legal services or to improving the legal profession. As the majority suggests, in some circumstances the state's interest " 'in drawing upon [lawyers'] training and experience'" may adequately justify additional infringement of bar members' First Amendment rights. (See maj. opn., ante, at p. [typed opn. at pp. 27] [quoting *Falk I*, supra, 305 N.W.2d 201, 231].) However, it

must remain to the State Bar and its members to work out and, if necessary, to future decisions to determine, whether other activities which additionally interfere with objecting State Bar members' First Amendment rights are justified by a sufficient governmental interest. I turn to the activities at issue in this case.

#### B. *Applying the Standard to the Present Case*

In seeking declaratory relief, plaintiffs challenge the State Bar's expenditure of objecting members' dues to fund the cost of lobbying the Legislature, filing briefs amicus curiae, holding conventions of the State Bar Conference of Delegates, disseminating the speeches of its then president-elect and conducting a public information program concerning the election of justices.

Because this matter comes to us on summary judgment, the record is not sufficiently developed to apply the constitutional standard to most of the expenditures plaintiffs challenge. Thus, I shall undertake to discuss only the constitutional parameters within which the objectionable activities should be analyzed.

##### 1. *Lobbying and Litigation Activities*

The constitutionality of the bar's expenditure of objecting members' dues to fund the cost of lobbying the Legislature or filing amicus curiae briefs cannot be determined in the abstract. The trial court would first have to determine whether the lobbying or litigation activity of which plaintiffs complain serves the governmental interest in advancing the delivery of quality legal services to



the public or improving the legal profession. If so, the court would then determine whether the challenged activity involves interference with First Amendment rights beyond that occasioned by compulsory bar membership itself. If it does, the State Bar would have the burden (see *Railway Clerks v. Allen* (1963) 373 U.S. 113, 122) of identifying some other governmental interest justifying such additional interference. (*Ellis*, supra, 466 U.S. 435 at p. 456.)

## 2. *Conference of Delegates*

There can be little doubt that some conference activities serve the state's interest in advancing the delivery of quality legal services to the public or in improving the legal profession. It also seems possible that some conference activities do not additionally infringe objecting members' First Amendment rights beyond the infringement inherent in compelled membership.

It appears likely, however, that expenditures for some conference activities would be found to impinge additionally upon objecting members' First Amendment rights. As to these expenditures, the bar would have the opportunity to identify a governmental interest justifying the expenditure. The record before us is insufficient to make this determination. Further, the trial court made no such determination and it would be the trial court's function in the first instance to do so. Thus, it would remain to the trial court to determine upon sufficient evidence whether any of plaintiffs' dues was expended in violation of their First Amendment rights.

## 3. *Bar Officers' Speeches and Public Information Programs*

Plaintiffs do not object to publication of bar officers' speeches or public information programs in general. Generally, insofar as publication of speeches or information programs serves the state's interest in advancing the delivery of quality legal services to the public or improving the legal profession, the bar may fund such activities with objecting members' mandatory dues. If such activities do serve these interests, the court would have to determine whether the challenged expenditures interfere with objecting members' First Amendment rights beyond the interference inherent in compulsory bar membership. If they do, the court would then determine if the challenged expenditures are nonetheless justified by some other sufficient governmental interest.

I do agree, however, with the majority that President-elect Anthony Murray's speech and the public education materials, by virtue of their content and timing, constituted the adoption of a specific position in a public election. Consequently, I agree that, as a matter of law, such election activities were not legally authorized expenditures under our decision in *Stanson v. Mott*, supra, 17 Cal.3d 206. That being so, no further analysis of those expenditures under the First Amendment is necessary.

## IV. *Remedies, Reimbursement and Procedure*

### A. *Declaratory and Injunctive Relief*

To the extent that plaintiffs could, within the purview of their pleadings, establish in further proceedings that the State Bar has used mandatory membership dues of



objecting members in excess of its legal authority to expend funds, or in violation of the First Amendment principles I have discussed, plaintiffs should be entitled to the declaratory relief they seek.

To the extent that they have established or could establish that funds were spent in excess of governing legal authority, they should also be entitled to injunctive relief to prevent such expenditures in the future. (*Stanson v. Mott*, supra, 17 Cal.3d at p. 223.)

#### B. Reimbursement

Plaintiffs have requested no monetary relief from the State Bar itself.<sup>11</sup> The only monetary relief plaintiffs have requested is for "an injunction [or writ of mandate to] issue compelling respondent and defendant members of the Board of Governors to reimburse the Treasury of the State Bar of California for all State Bar funds" wrongly expended. The State Bar, however, has not sought reimbursement from defendant governors and the authority of plaintiffs to seek reimbursement on the bar's behalf is dubious at best, as evidenced by plaintiffs' failure to assert any such authority. In any event, I agree with the majority that the governors cannot be held personally liable for reimbursement to the State Bar in view of the historical practices of the bar and in the absence of any record showing the governors knew any expenditures

<sup>11</sup> With the exception of their prayer for costs and attorneys' fees.

were unauthorized or failed to exercise "reasonable diligence" in authorizing the subject expenditures. (*Stanson v. Mott*, supra, 17 Cal.3d at pp. 226-227.)

#### C. Constitutionally Mandated Procedure

As to expenditures in violation of the First Amendment, the Constitution requires the bar to adopt procedures to allow members to identify the expenditures to which they may legitimately object and to prevent the bar from utilizing objecting members' dues for such purposes. (*Hudson*, supra, 475 U.S. at p. \_\_\_\_ [106 S.Ct. at pp. 1073-1074]; *Abood*, supra, 431 U.S. at p. 237, fn. 35.)

The majority has described such a procedure as "an extraordinary burden." (Maj. opn., ante, at p. [typed opn. at p. 20].) The procedure the majority envisions would require the bar, "whenever [it] proposed to advise the Legislature or the courts of its views on a matter, [to] first engage in the three-step analysis set out in *Ellis v. Railway Clerks* (1984) 466 U.S. 435." (Maj. opn. at p. [italics added [typed opn. at p. 19].) While the procedure envisioned by the majority might be "an extraordinary burden," the procedure mandated by the United States Supreme Court is not nearly so onerous.

As *Hudson*, supra, 475 U.S. at p. [106 S.Ct. at p. 1076] makes clear, "'[a]bsolute precision' in the calculation of the charge to [objecting members] cannot be 'expected or required.' [Citations.] Thus, for instance, the [association] cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The [association] need not provide [objecting members] with an exhaustive and detailed list of all its expenditures, but

adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." (*Hudson*, supra, 475 U.S. at p. , fn. 18 [106 S.Ct. at p. 1076, fn. 18].)

Therefore, contrary to the majority's assumption, the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to *Hudson*, supra, 475 U.S. 292 [106 S.Ct. 1066], the "the constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*Id.* at p. [106 S.Ct. at p. 1078].) Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof. Code § 6140.1), the argument that the constitutionally mandated procedure would create "an extraordinary burden" for the bar is unpersuasive.

While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of, *Abood* procedures for

over a decade.<sup>12</sup> (See Morris, *The Developing Labor Law* (2d ed. 1983 ch. 29, p. 1417.) Indeed, the Michigan State Bar has operated under a modified *Abood* procedure since 1985. (Admin. Order No. 1985-1 (1985) 420 Mich. lviii.) I have no doubt whatever the State Bar could, by adapting the *Hudson* procedures or otherwise, devise procedures that are workable, practical and meet the constitutional requirements set out in *Chicago Teachers v. Hudson*, supra, 475 U.S. 292.

#### V. Conclusion

For the foregoing reasons, with the exception of the cause asserting the governors' personal liability to reimburse the State Bar for expenditures made in violation of *Stanson v. Mott*, supra, 17 Cal.3d 206, I would affirm the Court of Appeal judgment with directions to remand the

<sup>12</sup> The majority suggests that the "more limited functions and constituency" of a labor union (maj. opn. fn. 12) properly subject it to *Ellis* analysis, while the State Bar's improvement of the administration of justice function render it inappropriate for application of the constitutionally mandated *Ellis* test. The majority's equation of statutory functions with justifying state interests again leads it astray. As I have shown, the relevant initial inquiry must be to determine which state interests justified compulsory bar membership in the first instance. Without benefit of briefing by the parties, I hesitate to make this determination unilaterally. I note, however, that at the time of integration of the bar, improvement of the "administration of justice" connoted interests far narrower than those the majority now ascribes to the phrase. (See, e.g., Winters, *Bar Association Organization and Activities* (1954) p. 171 [defining the field of the administration of justice as "[t]he organization, personnel and operation of the courts, the bar and their allied agencies and institutions"].)

case to the trial court for further proceedings consistent with this opinion.

KAUFMAN, J.

WE CONCUR:

PANELLI, J.

AGLIANO, Nat A.\*

\*Associate Justice, Court of Appeal, Sixth Appellate District, assigned by the Chairperson of the Judicial Council.

---



In The  
Supreme Court of the United States  
October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M.  
KINTER; DAVID LAMPE; GARRETT BEAUMONT;  
CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.;  
J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D.  
PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET;  
MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON;  
THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C.  
MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and  
A. WELLS PETERSEN,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY  
VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO;  
GEORGE W. COUCH, III; BURKE M. CRITCHFIELD;  
THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH  
GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A.  
HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A.  
SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD;  
and JOON HEE RHO,

*Respondents.*

On Writ Of Certiorari in the Supreme Court Of California

PETITIONERS' OPENING BRIEF

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
\*ANTHONY T. CASO  
\*Counsel of Record  
Pacific Legal Foundation  
2700 Gateway Oaks Drive,  
Suite 200  
Sacramento, California 95833  
Telephone: (916) 641-8888  
*Attorneys for Petitioners*

## ISSUES PRESENTED

1. Is the First Amendment to the United States Constitution implicated by a state law that compels all attorneys to belong and pay annual dues to a state bar association (a public corporation) where state law also grants the bar broad discretion to engage in political and ideological activities, with which some of its members may disagree, unrelated to the regulation of the legal profession?

2. Does a state law requirement that an attorney belong and pay dues to a state bar association violate the attorney's First Amendment rights of speech and association where the compelled fees and association are used to promote political and ideological activities with which the attorney disagrees such as adopting resolutions in favor of ballot initiatives concerning handgun control and a nuclear weapons freeze, lobbying on legislation concerning comparable worth, criminal penalties, and environmental issues, and filing briefs amicus curiae in support of an attack on the constitutionality of California's Victims' Bill of Rights Initiative and supporting prisoners arguing that California prison conditions violated their constitutional rights?

## PARTIES TO THE PROCEEDING

The caption sets forth the names of all of the parties to this action.

## TABLE OF CONTENTS

	Page
ISSUES PRESENTED.....	i
PARTIES TO THE PROCEEDING .....	i
TABLE OF AUTHORITIES CITED.....	iii
OPINIONS BELOW.....	2
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED .....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	8
ARGUMENT .....	10
I. MANDATORY MEMBERSHIP IN AND COMPELLED FEE PAYMENTS TO THE STATE BAR IMPLICATE CORE FIRST AMENDMENT LIBERTIES.....	10
A. The Rulings of This Court Establish That Compelled Association and Fee Payments Implicate Core First Amend- ment Rights .....	10
B. Compelled Membership in and Dues Payments to a State Bar Association Implicate First Amendment Freedoms..	14
C. The Government Speech Doctrine Does Not Immunize the Bar from First Amendment Scrutiny.....	20
II. THE BAR VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS IN THIS CASE....	23
CONCLUSION .....	25

## TABLE OF AUTHORITIES CITED

	Page
CASES	
Abood v. Detroit Board of Education, 432 U.S. 209 (1977) .....	<i>passim</i>
Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982)...	16, 24
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) .....	12, 13, 24
Doremus v. Board of Education, 342 U.S. 429 (1952) .....	21
Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984).....	12
Falk v. State Bar of Michigan, 418 Mich. 270, 342 N.W.2d 504 (1983) .....	18
Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986).....	17, 18, 22, 24
Hollar v. Government of the Virgin Islands, 857 F.2d 163 (3d Cir. 1988).....	17
International Association of Machinists v. Street, 367 U.S. 740 (1961) .....	11, 15, 16, 18
Lathrop v. Donohue, 367 U.S. 820 (1961) .....	<i>passim</i>
Petition of Chapman, 128 N.H. 24, 509 A.2d 753 (1986) .....	18, 19
Railway Employees' Department v. Hanson, 351 U.S. 225 (1956) .....	10, 11, 14, 15, 16, 18
Roberts v. United States Jaycees, 468 U.S. 609 (1984) .....	13, 14
Romany v. Colegio de Abogados de Puerto Rico, 742 F.2d 32 (1st Cir. 1984) .....	16



## TABLE OF AUTHORITIES CITED - Continued

	Page
Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969) . . . .	19
Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D.P.R. 1988) . . . . .	17
United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) . . . . .	22, 23
Wooley v. Maynard, 430 U.S. 705 (1977) . . . . .	21

## STATUTES

Business and Professions Code § 6000, et seq . . . . .	2
§ 6001 . . . . .	3
§ 6002 . . . . .	3, 5
§ 6005 . . . . .	5
§ 6008.5 . . . . .	3
§ 6012 . . . . .	4
§ 6013 . . . . .	4
§ 6013.4 . . . . .	4
§ 6013.5 . . . . .	4
§ 6028 . . . . .	4
§ 6031 . . . . .	4
§ 6040.1 . . . . .	3
§ 6125 . . . . .	5
§ 6126 . . . . .	5
§ 6140 . . . . .	3
28 U.S.C. § 1257(a) . . . . .	2

## TABLE OF AUTHORITIES CITED - Continued

	Page
CALIFORNIA CONSTITUTION	
Article IV, § 10(b) . . . . .	3
Article VI, § 9 . . . . .	2, 3
Article XVI, § 7 . . . . .	4
UNITED STATES CONSTITUTION	
First Amendment . . . . .	<i>passim</i>
Fourteenth Amendment . . . . .	2

No. 88-1905

---

In The

**Supreme Court of the United States**

**October Term, 1989**

---

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M.  
KINTER; DAVID LAMPE; GARRETT BEAUMONT;  
CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.;  
J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D.  
PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET;  
MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON;  
THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C.  
MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and  
A. WELLS PETERSEN,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY  
VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO;  
GEORGE W. COUCH, III; BURKE M. CRITCHFIELD;  
THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH  
GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A.  
HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A.  
SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD;  
and JOON HEE RHO,

*Respondents.*

---

On Writ Of Certiorari in the Supreme Court Of California

---

PETITIONERS' OPENING BRIEF

---

## OPINIONS BELOW

The decision of the California Supreme Court is reported at 47 Cal. 3d 1152, 767 P.2d 1020 (1989), and is reproduced in the Joint Appendix Volume III (Vol.) commencing at Page 556. The decisions of the California Court of Appeal and the Sacramento County Superior Court are reproduced in the Joint Appendix Vol. III commencing at Pages 477 and 480, respectively.

---

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The decision of the California Supreme Court in this case was entered on February 23, 1989, and was filed that same day. The petition for writ of certiorari was filed on May 24, 1989.

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The California constitutional provision at issue is Article VI, Section 9. Statutory provisions at issue are the provisions of California's State Bar Act, codified at California Business and Professions Code § 6000, *et seq.* The full text of the relevant provisions of that Act and the above-mentioned constitutional provisions are set forth in the appendix at the end of this brief.

---

## STATEMENT OF THE CASE

This is an action by attorneys, licensed to practice law in California, to halt the use of their compelled fees and association for political and ideological activities with which they disagree.

The State Bar of California (Bar) was created by statute (Cal. Bus. & Prof. Code § 6001) and is provided for in the California Constitution (Cal. Const. Art. VI, § 9). Established as a "public corporation," the Bar is far more than a regulatory agency. Both the statute and the constitution refer to the Bar as having "members." Cal. Bus. & Prof. Code § 6002; Cal. Const. Art. VI, § 9. The annual fee required of all California attorneys is termed a "membership fee." Cal. Bus. & Prof. Code § 6140. The Bar is specifically exempted from state laws "restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or agencies." Cal. Bus. & Prof. Code § 6001. Although the Bar must submit its proposed budget to the Legislature, it does not require legislative approval nor is it subjected to the review processes applicable to other state budgetary items, most notably the Governor's line item veto power. *Compare* Cal. Bus. & Prof. Code § 6040.1 *with* Cal. Const. Art. IV, § 10(b). In fact, the Bar may even *compel* the Legislature to maintain the annual membership fee at a certain level. *See* Cal. Bus. & Prof. Code § 6008.5.

The Bar is governed by a body that is a mixture of elected representatives and political appointees. A total of 21 individuals sit on the Bar's Board of Governors. Fifteen members of the board are attorneys that are elected to represent geographic districts. Cal. Bus. & Prof.



Code §§ 6012, 6013. These districts were originally established by the enactment of the State Bar Act in 1927 and have not been reapportioned since.<sup>1</sup> One attorney member is appointed by the board of directors of the California Young Lawyers Association. Cal. Bus. & Prof. Code § 6013.4. The remaining six seats on the board are filled by "public members." One such member is appointed by the Speaker of the Assembly, and one by the Senate Rules Committee. The other four are appointed by the Governor, but must receive Senate confirmation. Cal. Bus. & Prof. Code § 6013.5.

The Board of Governors has broad ranging powers under the State Bar Act. In addition to being exempt from the state procedures outlined above, the board may also appropriate and disburse funds without specific legislative approval or action on the part of the State Controller. Compare Cal. Bus. & Prof. Code § 6028 with Cal. Const. Art XVI, § 7. Of most relevance to this proceeding are the board's powers pursuant to Section 6031:

"The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

<sup>1</sup> For the first time in 62 years the Bar is under orders to reapportion those districts. Senate Bill 818 (1989) was signed by the Governor and requires the Bar to prepare new districts by June 30, 1990, and every 10 years thereafter.

As noted above, all attorneys in California are required to be "members" of and pay an annual "membership fee" to the Bar. Cal. Bus. & Prof. Code § 6125. Practicing law without adhering to these requirements is a misdemeanor criminal offense. Cal. Bus. & Prof. Code § 6126. The Bar uses this mandatory membership and compelled fee to promote political and ideological activities unrelated to the regulation of the practice of law.

This action was originally filed in 1982 to challenge the constitutionality of the Bar's political activities.<sup>2</sup> The complaint alleged that the Bar used dues revenues to lobby the Legislature on a variety of issues such as comparable worth, joint custody, automobile warranties, polygraph testing, armor piercing bullets, air pollution, lifeline public utility rates, drug paraphernalia, Aid to Families with Dependent Children, special education, solid waste management plans, child support levels, inmate labor, low rent housing projects, and sex discrimination to name but a few. Joint Appendix (JA) Vol. I at 9-12. It was also alleged that the Bar submitted amicus curiae briefs in various cases including a brief supporting a challenge to the validity of an initiative measure

<sup>2</sup> Since the filing of this action seven years ago, the status of some of the plaintiffs has changed. Eddie Keller has been appointed judge of the Superior Court and Nancy Sweet has been appointed judge of the Municipal Court. As such, neither are compelled to pay annual dues to the Bar during their judicial tenure. Cal. Bus. & Prof. Code § 6002. A. Wells Petersen has retired from the practice of law and has assumed inactive status. Cal. Bus. & Prof. Code § 6005. One of the original defendants, Phyllis Hix, was dismissed from the action prior to the judgment of the court below.

known as the Victims' Bill of Rights and another brief supporting a challenge to California prison conditions. JA Vol. I at 12; Vol. III at 449. The complaint further alleged that the Bar used dues moneys to finance meetings of the Conference of Delegates. During these meetings, a wide variety of resolutions are debated and voted upon. In 1982, the conference adopted resolutions endorsing state ballot measures calling for a nuclear weapons freeze and another concerning handgun control. Resolutions were also adopted supporting comparable worth and supporting adoption of an Equal Rights Amendment to the United States Constitution. JA Vol. I at 13.<sup>3</sup> In its answer, the Bar admitted these factual allegations. JA Vol. II at 226-27.

Petitioners sought a preliminary injunction prohibiting the Bar from using mandatory dues revenues or the name of the State Bar to promote political or ideological causes. This motion was denied by the trial court. JA Vol. II at 222-24. Later, the Bar filed a motion for summary judgment seeking dismissal of petitioners' claims. JA Vol. III at 478. Petitioners filed a cross-motion for partial summary judgment seeking declaratory relief on the issue of whether the Bar violated petitioners' First Amendment rights in using compelled membership and dues to support political causes. In support of the cross-motion, petitioners submitted evidence concerning the

---

<sup>3</sup> The complaint also challenged the Bar's use of dues revenues to finance a campaign in support of sitting members of the California Supreme Court during a judicial retention election. The court below ruled that the Bar's conduct in this regard violated state law. That issue is, therefore, not before this Court.

Bar's political activities. JA Vol. II at 234-432. For instance, the Bar has established sections and committees whose purposes include legislative analysis and advocacy. JA Vol. II at 264-65, 269-79, 280-82. Sections of the Bar are self funded except for legal, clerical, and administrative support which are financed by dues revenues. JA Vol. II at 264, 267. Committees of the Bar are entirely funded by dues revenues. The Bar maintains committees on Administration of Justice, Condemnation, Ethnic Minority Relations, Environment, and Human Rights, among others. JA Vol. II at 265-67. Bar sections exist for several substantive areas of the law including antitrust, criminal, and family law. JA Vol. II at 264-65. Both the committees and sections receive substantial financial support from mandatory dues revenues. JA Vol. II at 267, 282-366.

The trial court granted the Bar's motion for summary judgment and denied petitioners' cross-motion. JA Vol. III at 479. The trial court ruled that because the Bar was a state agency, the First Amendment did not restrict the Bar's activities. JA Vol. III at 478. The Court of Appeal reversed, ruling that the *Abood* line of cases were applicable to integrated bar associations. JA Vol. III at 482. The California Supreme Court reversed this part of the judgment of the Court of Appeal. JA Vol. III at 556.

Adopting a rationale similar to that of the trial court, the California Supreme Court ruled that the Bar was a government agency, and as such the *Abood* line of cases did not apply. JA Vol. III at 575-76. Instead, the court ruled that the only limitation on Bar activities was that contained in the statute:

"Accordingly, we conclude the bar may use dues to finance all activities germane to its statutory purpose, a phrase we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation." JA Vol. III at 558.

The court emphasized the breadth of the Bar's authority. Noting that the Bar was authorized to advance the "administration of justice," the court ruled:

"In the context of lobbying and amicus curiae activities, this language should be read broadly. Laws are the business of lawyers. . . . Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal." JA Vol. III at 579.

Noting the conflict between the decision of the California Supreme Court and the decisions of other courts in similar cases, petitioners petitioned this Court for a writ of certiorari.

---

#### SUMMARY OF ARGUMENT

In *Abood v. Detroit Board of Education*, 432 U.S. 209 (1977), this Court confronted for the first time the issue of whether the First Amendment prohibited the expenditure of a dissenter's compelled fees for political and ideological causes. That case concerned "agency shop fees," those fees that nonunion employees are required to pay to the union serving as collective bargaining representative. Before analyzing the issue, the Court turned to its prior decision in *Lathrop v. Donohue*, 367 U.S. 820 (1961), a case

concerning compelled membership in and dues payments to a state bar association. Since the Court was unable to agree on an opinion concerning the constitutionality of bar expenditures, the *Lathrop* decision did not provide any guidance to the Court in *Abood*. The issue before the Court today is somewhat reversed. Having decided in *Abood* the constitutional issue of political uses of a dissenter's compelled fees, does that labor union case provide guidance to the Court in reviewing the constitutionality of bar association expenditures?

The decisions of this Court establish that when the state compels an individual into an expressive association, a significant impingement of the individual's First Amendment rights has taken place. The Court has noted that the rights called into issue in these cases concern the freedom of belief and go to the very heart of the First Amendment. In order to overcome those rights, the state must demonstrate a compelling governmental interest.

The Court's decisions in this area are not limited to the labor union context. In fact, in a number of cases this Court has noted the similarity between compelled fee payments to a collective bargaining representative and compelled membership in a state bar association. The Circuit Courts of Appeals that have considered this issue have also found this Court's decisions in the labor union context dispositive of similar claims concerning integrated bar associations. State Supreme Courts in Michigan and New Hampshire have reached the same conclusion.

The Bar in this case may not shield its conduct by relying on the so-called "government speech" doctrine.



Under that doctrine, it is alleged that government is free to add its own voice to a controversy and may expend general tax revenues for expressive purposes. In the compelled bar association context, however, there is a coercive nexus between the message and the dissenter. The fees are collected from a select population that is occupationally homogeneous, and who are termed "members" of the association spreading the offensive message.

Under the facts of this case, the Bar has violated the First Amendment rights of the petitioners. Whether the state's interest in compelling membership in the Bar is seen as a method of regulating the practice of law, improving the delivery of legal services, or improving the judicial system, none of those interests are advanced by the conduct of the Bar at issue in this case. The Bar's expression of an opinion on topics ranging from national defense to environmental concerns to amendment of the United States Constitution does not advance any legitimate governmental purpose.

---

## ARGUMENT

### I

#### MANDATORY MEMBERSHIP IN AND COMPELLED FEE PAYMENTS TO THE STATE BAR IMPLICATE CORE FIRST AMENDMENT LIBERTIES

##### A. The Rulings of This Court Establish That Compelled Association and Fee Payments Implicate Core First Amendment Rights

The issues raised in this case are not new to this Court. They were first raised more than three decades ago in the case of *Railway Employees' Department v. Hanson*,

351 U.S. 225 (1956). In that case employees challenged provisions of the Railway Labor Act authorizing "union shop" contracts that require all employees in a bargaining unit to pay union dues. In *Hanson*, this Court upheld the facial validity of the Railway Labor Act, but reserved for another day decision on whether First Amendment liberties were violated if the union used compelled dues payments for political activities.

The issue returned to this Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961). The factual record missing in *Hanson* was presented in *Street* and the Court noted the existence of serious constitutional issues. *Id.* at 748-49. Instead of reaching those questions, however, this Court construed the union shop provisions of the Railway Labor Act to prevent the union from using a dissenter's compelled dues payment to advance political or ideological causes unrelated to collective bargaining. *Id.* at 769.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court was again confronted with the issues raised in *Hanson* and *Street*. Unlike the previous decisions, however, the constitutional issues were squarely presented. The Court recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests." *Id.* at 222. In keeping with the earlier decisions in *Hanson* and *Street*, the Court ruled that the interference with First Amendment rights was justified by the government interest in labor peace and stability. *Id.*

Turning to the issue of union expenditures promoting political and ideological causes unrelated to collective bargaining, this Court described the nature of the First Amendment liberties at stake. The Court noted that First Amendment protection of association for the advancement of ideas was clearly rooted in prior decisions of the Court. *Id.* at 233. Similarly, contributing money to an association "for the purpose of spreading a political message" was also protected by the First Amendment. *Id.* This Court ruled that the First Amendment protections were the same whether an individual was prohibited from making contributions or was compelled to do so. *Id.* The Court went on to describe the nature of the rights at stake as implicating freedom of belief and going to the "heart of the First Amendment." *Id.* at 234.

Again in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), this Court noted that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Id.* at 455. That infringement is justified, however, by the government interest at stake - labor peace and stability. *Id.* at 456.

Most recently, this Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), reaffirmed its ruling in *Abood* that agency shop agreements (requirements that non-union members pay the union a fee) interfere with the freedom of association for the advancement of ideas. *Id.* at 301. This Court went on to rule that the nature of the First Amendment rights at stake required procedural protections to ensure that those rights would not be violated in the first instance. *Id.* at 302-03.

Throughout this unbroken line of cases, this Court has repeatedly ruled that compelled association with, or fee payments to, a group which the dissenter does not wish to support or associate with, implicates core First Amendment liberties. The Court has not once suggested that the rights at stake in these cases are unimportant or entitled only to a lesser level of protection. Indeed, in the *Abood* decision, this Court described these rights as being at the very heart of the First Amendment. Of course, this does not mean that these rights are absolute. The Court has allowed infringements where necessary to support certain government interests.

In *Abood*, this Court described the necessary government interest as "important." *Abood*, 431 U.S. at 225. In later decisions, however, this Court has indicated that these rights may be overcome only by a "compelling" interest. Specifically, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court considered the issue of whether a state could compel a private association to accept certain classes of individuals into their membership. Citing *Abood* for the proposition that the First Amendment protects the right *not* to associate with others, this Court noted that such rights are not absolute.

"Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623.

This Court has noted that the compelling state interest test is also applicable in the compelled fee context. *Hudson*, 475 U.S. at 304 n.11.

Nothing on the face of these rulings indicates in any way that they are limited to the labor union context. Instead, as with its decision in *Roberts*, this Court has recognized that the First Amendment protects the right of expression and association and that these rights are implicated by state regulations that compel association with or fee payments to a group involved in political advocacy. As will be demonstrated below, this line of reasoning applies with equal force to compelled membership in and dues payments to a state bar association.

**B. Compelled Membership in and Dues Payments to a State Bar Association Implicate First Amendment Freedoms**

The court below rejected this line of cases as providing the appropriate analytical framework for this case. That court simply ruled that the state bar was not a labor union, but was instead an agency of the State of California. JA Vol. III at 574-75. In refusing to follow the *Hanson* line of cases, the court below not only rejected the decisions of other jurisdictions, but also ignored the rulings of this Court that at least imply that the *Hanson* line of cases apply to the state bar association context.

In *Hanson*, the Court rejected a facial attack on the union shop provision of the Railway Labor Act. Significantly, the Court found the case analogous to compelled membership in a state bar association. *Hanson*, 351 U.S. at 238. Of course, this remark in the *Hanson* opinion is not dispositive. It is also, however, not the only time the Court has noted the similarity between the claims raised

by petitioners in this case and those raised in the labor union context.

This Court has reviewed the constitutionality of compelled membership in a state bar association on one prior occasion. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Court rejected a challenge to the *facial* constitutionality of a Wisconsin court order mandating membership in and annual dues payments to a state bar. Again, the Court referred to its decision in *Hanson* as dispositive of the issue of compelled membership. "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees' Dept. v. Hanson*." *Lathrop*, 367 U.S. at 842 (plurality opinion). The Court in *Lathrop* was unable to reach the issue presented in this case – whether the Bar violates the rights of dissenters when it uses compelled fees and association to promote political activities unrelated to the practice of the law. The plurality ruled that, as was the case in *Hanson*, the factual record before the Court did not properly present that issue. *Id.* at 848. Five members of this Court were willing to reach the constitutional issue. Three members would have rejected the constitutional claims. *Id.* at 848 (opinion of Harlan, J.); 865 (opinion of Whittaker, J.). The other two members of the Court would have sustained the constitutional objections. *Id.* at 865 (opinion of Black, J.); 877 (opinion of Douglas, J.).

Again in *Abood*, this Court noted the analytical similarities between agency shop and compelled bar associations. After ruling that the constitutional issues avoided in *Hanson* and *Street* were squarely presented, the Court looked to its decision in *Lathrop* for guidance in resolving



those constitutional questions. *Abood*, 431 U.S. at 233 n.29. Of course, since there was no agreement on the constitutional issues in *Lathrop*, the *Abood* Court noted that *Lathrop* did not provide much in the way of guidance. Significantly, however, the Court believed the two situations to be sufficiently similar so that the holdings in one case would at least provide guidance in the other.

Although this Court has yet to confront this issue directly, several other courts have. With the exception of the decision here under review, they are nearly unanimous in their application of the *Hanson* line of cases.

In *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982), the Federal District Court upheld a challenge to the use of mandatory bar fees by the New Mexico Bar to lobby the New Mexico Legislature. The court relied on this Court's rulings in *Hanson*, *Street*, and *Abood* to conclude that the New Mexico Bar's use of mandatory fees for political activities implicated First Amendment liberties. 544 F. Supp. at 460. The New Mexico Bar urged that its lobbying activities should nonetheless be allowed since they served "to promote the administration of justice or improvement of the legal system." *Id.* at 462. The court rejected the bar's argument as an attempt to create "an all-encompassing exception to the rule of *Abood*." *Id.*

The federal courts have reached similar conclusions regarding the activities of the Puerto Rico Bar. In *Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984), the First Circuit reversed a remedial order of the District Court on the grounds that the lower court should have abstained from jurisdiction in the case. *Id.* at 40. The Circuit Court affirmed the lower court's ruling,

however, that the Colegio's use of mandatory dues to promote political causes violated dissenters' First Amendment rights. Relying on *Abood*, the Circuit Court noted that even though the federal courts should abstain in the case, the importance of the First Amendment rights at stake entitled the dissenters to interim relief from the federal courts. *Id.* at 44. In 1988, the District Court ruled that the Puerto Rico courts had failed to remedy the situation. The court ruled that the Colegio's ideological activity was so pervasive as to make mandatory membership itself unconstitutional. *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674, 690 (D.P.R. 1988).

Both the Eleventh and Third Circuits have reached similar conclusions. In *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988), the Third Circuit relied on this Court's decision in *Abood* to analyze an attack on the activities of the Virgin Islands Bar. That court ruled that an integrated bar could constitutionally use compelled fees to express opinions if the cause at issue was "germane to the purpose underlying [the bar's] integration, i.e., the furtherance of the administration of justice." *Id.* at 170.

The Eleventh Circuit's decision was even more broad ranging. In *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986), the court again relied on *Hanson* and *Abood* to analyze an attack on the political activities of an integrated bar association. Finding this Court's decision in *Abood* persuasive in the bar context, the Circuit Court ruled that the Florida Bar may use mandatory dues to finance lobbying "only to the extent that it assumes a political or ideological position on matters that are germane to the Bar's stated purposes." *Gibson*, 798 F.2d

at 1569. The court noted that the bar would have the burden of proving that its "expenditures were constitutionally justified." *Id.* Further, the bar's expenditures would be examined under the compelling state interest/least drastic means test. In other words, even if the bar could show that its lobbying program served a compelling interest, it would still need to show that the interest could not be advanced by an alternative means less harmful to First Amendment liberties. *Id.*

The federal courts are not alone in adopting the *Hanson* line of cases as controlling in questions of political activities by integrated bar associations. A number of state courts have come to the same conclusion. In *Falk v. State Bar of Michigan*, 418 Mich. 270, 342 N.W.2d 504 (1983), the Michigan Supreme Court was unable to reach a majority position on the constitutionality of the activities of the Michigan Bar. While disagreeing on the appropriate conclusion, a clear majority of that court agreed that the First Amendment was implicated by a mandatory bar association's political activities. *Id.* at 509 (opinion of Boyle, J.); 515-16 (opinion of Ryan, J.). The conclusions in those disparate opinions were reached after recognition of the applicability of this Court's ruling in *Abood*. *Id.* at 508 (opinion of Boyle, J.); 516 (opinion of Ryan, J.).

The New Hampshire Supreme Court also found the *Hanson* line of cases controlling. In *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (1986), that court acknowledged that political activities by an integrated bar presented "serious risk of infringement of first amendment liberties." *Id.* at 758. Relying on *Abood*, *Street*, and its own inherent power to regulate the legal profession, the New Hampshire Supreme Court upheld a challenge to bar

lobbying on legislative proposals concerning "tort reform." *Id.*

Only one state court has failed to apply the agency fee cases in the state bar context. The Georgia Supreme Court in *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969), rejected a constitutional attack on legislation establishing the Georgia Bar. The decision, issued eight years prior to this Court's ruling in *Abood*, settled the First Amendment challenge by holding that the "State Bar Act does not authorize the organization to engage in political activities." *Id.* at 798.<sup>4</sup>

The California Supreme Court noted the holdings in those cases but rejected their applicability to this case: "None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation." JA Vol. III at 574. This attempt to distinguish cases on the basis of which branch of state government regulates the bar is without merit.

In terms of constitutional rights, it can make no difference which part of government authored the offending regulation – the effect is still the same. The California Legislature is no more free to violate First Amendment

---

<sup>4</sup> The California Supreme Court also referred to a quote in *Sams*: "The State Bar of Georgia is not a labor organization," *Sams*, 169 S.E.2d at 799, as an indication that the Georgia court rejected the agency fee line of cases. JA Vol. III at 574 n.14. In fact, the quoted language is from a portion of the decision rejecting an attack on the Bar Act as violative of Georgia's Right to Work law. *Sams*, 169 S.E.2d at 799.

rights than are the courts of Florida, Puerto Rico, New Hampshire, or New Mexico.<sup>5</sup> Indeed, the creation of a state bar is a legislative act, regardless of which branch of government provided for that creation.

One of the issues in *Lathrop* was whether the case was properly before this Court by way of appeal. At that time, the appeal statute provided for Supreme Court jurisdiction over matters concerning the validity of a state "statute." *Lathrop*, 367 U.S. at 824 (plurality opinion). Since the Wisconsin Bar was created by order of the Wisconsin Supreme Court, there was of course no statute at issue. The plurality ruled that the integration order was legislative in character and that the appeal was proper. *Id.* at 827. It thus makes no difference which branch of government authored the legislative act creating the state bar. The First Amendment analysis must be the same.

### C. The Government Speech Doctrine Does Not Immunize the Bar from First Amendment Scrutiny

The Bar has argued, and the California Supreme Court ruled, that the government speech doctrine shields the Bar from attack on its political activities. The court below held:

"If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition,

<sup>5</sup> Indeed, the literal command of the First Amendment is aimed at the legislative branch of government.

donation, or other sources, for any purposes within its authority." JA Vol. III at 576.

In making its ruling, the court below identified neither the source of this rule, nor its parameters.

This Court has yet to issue such a sweeping pronouncement and indeed, at least with regard to the expenditure of general tax revenue, the federal requirement of standing may well prevent the issue from ever reaching this Court. See *Doremus v. Board of Education*, 342 U.S. 429, 435 (1952).

The existence of the doctrine is hinted at, however, in various concurring and dissenting opinions authored by members of this Court. In *Lathrop*, for example Justice Harlan's concurring opinion urges that legislatures are free to establish commissions for the purpose of advising the lawmakers on what changes should be made in the law. 367 U.S. at 864. In *Wooley v. Maynard*, 430 U.S. 705 (1977), then Justice Rehnquist suggested in a dissenting opinion that the state was free to spend tax revenues to erect billboards for the purpose of spreading an ideological message. *Id.* at 721 (Rehnquist, J., dissenting). Finally, in *Aboud*, Justice Powell's concurring opinion notes:

"Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests." 431 U.S. at 259 n.13 (opinion of Powell, J.).



The Court need not reach the issue of the precise parameters of the government speech doctrine in this case since the hypothetical situations mentioned above are all distinguishable from the present case. This is not a case of government spending general tax revenues. Nor is it a case of a government spending program established through normal legislative channels. This Court does not review the question in this case of whether a state legislature may establish a commission to advise lawmakers on technical issues. Instead, this Court reviews the activities of an association "which is representative only of one segment of the population, with certain common interests." This was precisely the conclusion reached by the Eleventh Circuit in *Gibson*. 798 F.2d at 1568.

A recent decision of the Third Circuit is in accord with this reasoning. In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), the court reviewed a broad ranging attack on the Beef Promotion and Research Act of 1985. Under that law, cattle producers are assessed a fee of one dollar on each head of cattle sold, for the purpose of financing a national beef promotional campaign. One of the grounds of the challenge was that the compelled fee for promotional activities violated the cattle producer's First Amendment rights. The court rejected the government's argument that the speech at issue was "government speech." Noting then Justice Rehnquist's dissent in *Wooley* and Justice Harlan's concurrence in *Lathrop*, the Third Circuit found the distinguishing fact to be the nature of the association, rather than the nature of the speaker:

"Both the right to be free from compelled expressive association and the right to be free

from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. . . . In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes." *United States v. Frame*, 885 F.2d at 1132.

This is precisely the case now before this Court. Unlike the expenditure of general tax revenues by a state legislature, there is direct nexus between the dissenting lawyer and the causes promoted by the State Bar. The existence of this nexus establishes petitioners' claim that mandatory membership in and compelled fee payments to the State Bar impact on their First Amendment freedoms. As will be demonstrated below, the Bar's use of that mandatory membership and compelled fee to promote political and ideological causes violated petitioners' First Amendment rights.

## II

### THE BAR VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS IN THIS CASE

The conclusion that mandatory membership in and compelled dues payments to the State Bar impacts First Amendment rights does not end the analysis in this case. As this Court ruled in *Abood*, these First Amendment rights are not absolute. *Abood*, 431 U.S. at 225-26. To justify an infringement of these rights, however, the Bar

must demonstrate that a compelling governmental interest is served by the compelled association and dues payments. See *Hudson*, 475 U.S. at 303 n.11.

The issue of what if any compelling interests are served by the State Bar was not addressed by the California Supreme Court. That court never reached the First Amendment issue and thus did not have occasion to offer its view on the interests served by the Bar.

Petitioners would concede that one such compelling interest would be the regulation of the practice of law. It is certainly within the province of the State of California to determine that such regulation is best performed by an integrated bar association. Of course, this regulatory interest does not support any of the political or ideological activity here under attack.

Another governmental interest often mentioned in cases concerning bar associations is the advancement of the administration of justice. See, e.g., *Gibson*, 798 F.2d at 1569; *Arrow*, 544 F. Supp. at 462. The problem with this purported interest is that, at least as used by the California Supreme Court, it is a term without definition. According to that court, anything having to do with any law relates to the improvement of the administration of justice. JA Vol. III at 579. As was the case in *Arrow*, this purported interest would become an "all-encompassing exception to the rule of *Abood*." 544 F. Supp. at 462.

In contrast to the decision of the California Supreme Court, the California Court of Appeal did attempt to define what was meant by the "administration of justice." That court ruled that the term related to the mechanics of how the legal system operated. JA Vol. III at 517 n.13. The

dissenting opinion in the California Supreme Court viewed the state's interest as relating to the delivery of quality legal services and improvement of the legal profession. JA Vol. III at 611. In either case, the activities of the Bar challenged by petitioners could not withstand scrutiny.

The lobbying activities of the Bar covered the whole spectrum of issues from family law to environmental concerns to criminal penalties. JA Vol. I at 9-12. None of these related to the operation of the court system, delivery of legal services, or improvement of the profession. Similarly, resolutions of the Conference of Delegates ranged from handgun control to amendment of the United States Constitution to foreign policy and national defense. JA Vol. I at 13; Vol. II at 369-409. It would be difficult to imagine topics more remote from a state interest in improving the legal system.

Finally, the Bar's amicus efforts in attacking the Victims' Bill of Rights Initiative and supporting prisoners' constitutional challenge to state prison conditions are wholly unrelated to the delivery of legal services or the mechanics of the judicial system. The Bar has failed to establish a state interest, compelling or otherwise, that would support such activities.

---

## CONCLUSION

The decision of the California Supreme Court conflicts not only with the rulings of other state Supreme Courts and Federal Circuit Courts of Appeals, but also

with the rulings of this Court. State regulations compelling membership in and fee payments to an expressive association implicate fundamental First Amendment liberties. Absent a compelling governmental interest, such requirements must fall.

Although the State of California has a compelling interest in regulating the practice of law, that interest does not support the political and ideological activity of the State Bar. Nor are the Bar's activities supported by any state interest in the improvement of the legal system or delivery of legal services. The challenged activities are clearly beyond the scope of any legitimate governmental interest. Compelling petitioners to support such activities through their compulsory membership and fee payments therefore violates the First Amendment of the United States Constitution.

Petitioners urge this Court to reverse the judgment of the California Supreme Court and to declare compulsory support of the Bar's political activity unconstitutional.

DATED: November, 1989.

Respectfully submitted,

RONALD A. ZUMBRUN

JOHN H. FINDLEY

\*ANTHONY T. CASO

\*Counsel of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive,  
Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

*Attorneys for Petitioners*



## STATUTORY APPENDIX

UNITED STATES CONSTITUTION,  
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

---

UNITED STATES CONSTITUTION,  
AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to

any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## CALIFORNIA CONSTITUTION, ARTICLE VI

SEC. 9. The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record. *[New section adopted November 8, 1966.]*

---

### SELECTED PROVISIONS OF THE STATE BAR ACT CALIFORNIA BUSINESS AND PROFESSIONS CODE

#### § 6000. Short title

This chapter of the Business and Professions Code constitutes the chapter on attorneys. It may be cited as the State Bar Act.

#### § 6001. State bar; perpetual succession; seal; powers; revenue; laws applicable

The State Bar of California is a public corporation. It is hereinafter designated as the State Bar.

The State Bar has perpetual succession and a seal and it may sue and be sued. It may, for the purpose of carrying into effect and promoting its objectives:



(a) Make contracts.

(b) Borrow money, contract debts, issue bonds, notes and debentures and secure the payment or performance of its obligations.

(c) Own, hold, use, manage and deal in and with real and personal property.

(d) Construct, alter, maintain and repair buildings and other improvements to real property.

(e) Purchase, lease, obtain options upon, acquire by gift, bequest, devise or otherwise, any real or personal property or any interest therein.

(f) Sell, lease, exchange, convey, transfer, assign, encumber, pledge, dispose of any of its real or personal property or any interest therein, including without limitation all or any portion of its income or revenues from membership fees paid or payable by members.

(g) Do all other acts incidental to the foregoing or necessary or expedient for the administration of its affairs and the attainment of its purposes.

Pursuant to those powers enumerated in subdivisions (a) to (g) inclusive, it is recognized that the State Bar has authority to raise revenue in addition to that provided for in Section 6140 and other statutory provisions. The State Bar is empowered to raise that additional revenue by any lawful means, including, but not limited to, the creation of foundations or not-for-profit corporations.

No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public

bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with Section 11000), Division 4 (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares.

#### § 6002. Members

The members of the State Bar are all persons admitted and licensed to practice law in this state except justices and judges of courts of record during their continuance in office.

#### § 6002.1. Official membership records; maintenance of information; service of notice initiating proceedings; availability of information on records; form for reports

(a) A member of the State Bar shall maintain all of the following on the official membership records of the State Bar:

(1) The member's current office address and telephone number or, if no office is maintained, the address to be used for State Bar purposes or purposes of the agency charged with attorney discipline.

(2) All specialties in which the member is certified.

(3) Any other jurisdictions in which the member is admitted and the dates of his or her admission.

(4) The jurisdiction, and the nature and date of any discipline imposed by another jurisdiction, including the terms and conditions of any probation imposed, and, if suspended or disbarred in another jurisdiction, the date of any reinstatement in that jurisdiction.

(5) Such other information as may be required by agreement with or by conditions of probation imposed by the agency charged with attorney discipline.

A member shall notify the membership records office of the State Bar of any change in the information required by paragraphs (1), (4), and (5) within 30 days of any change and of any change in the information required by paragraphs (2) and (3) on or before the first day of February of each year.

(b) Every former member of the State Bar who has been ordered by the Supreme Court to comply with Rule 955 of the California Rules of Court shall maintain on the official membership records of the State Bar the former member's current address and within 10 days after any change therein, shall file a change of address with the membership records office of the State Bar until such time as the former member is no longer subject to the order.

(c) The notice initiating a proceeding conducted under this chapter may be served upon the member or former member of the State Bar to whom it is directed by certified mail, return receipt requested, addressed to the member or former member at the latest address shown on the official membership records of the State Bar. The service is complete at the time of the mailing but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed

period or on a date certain after the notice is served by mail shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. A member of the State Bar or former member may waive the requirements of this subdivision and may, with the written consent of another member of the State Bar, designate that other member to receive service of any notice or papers in any proceeding conducted under this chapter.

(d) The State Bar shall not make available to the general public the information specified in paragraph (5) of subdivision (a) unless required to be made so available by a condition of probation; it is, however, available to the State Bar, the Supreme Court, or the agency charged with attorney discipline.

(e) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

#### **§ 6003. Classes of members**

Members of the State Bar are divided into two classes:

- (a) Active members.
- (b) Inactive members.

#### **§ 6004. Active members**

Every member of the State Bar is an active member

until as in Section 6007 of this code provided or at his request, he is enrolled as an inactive member.

**§ 6005. Inactive members**

Inactive members are those members who have requested that they be enrolled as inactive members or who have been enrolled as inactive members by action of the board of governors as in Section 6007 of this code provided.

**§ 6006. Retirement from practice; privileges of inactive members**

Active members who retire from practice shall be enrolled as inactive members at their request.

Inactive members are not entitled to hold office or vote or practice law. Those who are enrolled as inactive members at their request may, on application and payment of all fees required, become active members. Those who are enrolled as inactive members as in Section 6007 of this code provided may become active members as in said Section 6007 provided.

Inactive members have such other privileges, not inconsistent with this chapter, as the board of governors provides.

**§ 6007. Involuntary treatment or confinement; involuntary, inactive enrollment; restoration to capacity; interim remedies**

(a) When a member requires involuntary treatment pursuant to Article 6 (commencing with Section 5300) of

Chapter 2 of Division 5 of, or Part 2 (commencing with Section 6250) of Division 6 of the Welfare and Institutions Code, or when under an order pursuant to Section 3051, 3106.5, or 3152 of the Welfare and Institutions Code he or she has been placed in or returned to inpatient status at the California Rehabilitation Center or its branches, or when he or she has been determined insane or mentally incompetent and is confined for treatment or placed on outpatient status pursuant to the Penal Code, or on account of his or her mental condition a guardian or conservator, for his or her estate or person or both, has been appointed, the Board of Governors or an officer of the State Bar shall enroll the member as an inactive member.

The clerk of any court making an order containing any of the determinations or adjudications referred to in the immediately preceding paragraph shall send a certified copy of that order to the State Bar at the same time that the order is entered.

The clerk of any court with which is filed a notice of certification for intensive treatment pursuant to Article 4 (commencing with Section 5250) of Chapter 2 of Division 5 of the Welfare and Institutions Code, upon receipt of the notice, shall transmit a certified copy of it to the State Bar.

**§ 6008. Property; exemption from taxation**

All property of the State Bar is hereby declared to be held for essential public and governmental purposes in the judicial branch of the government and such property is exempt from all taxes of the State or any city, city and



county, district, public corporation, or other political subdivision, public body or public agency.

**§ 6008.1 Bonds, notes, etc.; liability; approval**

No bond, note, debenture, evidence of indebtedness, mortgage, deed of trust, assignment, pledge, contract, lease, agreement or other contractual obligation of the State Bar shall:

- (a) Create a debt or other liability of the State nor of any entity other than the State Bar (or any successor public corporation).
- (b) Create any personal liability on the part of the members of the State Bar or the members of the board of governors or any person executing the same, by reason of the issuance or execution thereof.
- (c) Be required to be approved or authorized under the provisions of any other law or regulation of this State.

**§ 6008.2 Bonds, notes, etc.; exemption from taxation**

Bonds, notes, debentures and other evidences of indebtedness of the State Bar are hereby declared to be issued for essential public and governmental purposes in the judicial branch of the government and, together with interest thereon and income therefrom, shall be exempt from taxes.

**§ 6008.3 Default upon obligations; rights and remedies**

The State Bar may vest in any obligee or trustee the right, in the event of default upon any obligation of the

State Bar, to take possession of property of the State Bar, cause the appointment of a receiver for such property, acquire title thereto through foreclosure proceedings, and exercise such other rights and remedies as may be mutually agreed upon between the State Bar and the holder or proposed holder of any such obligation.

**§ 6008.4 Exercise of powers by board of governors**

All powers granted to the State Bar by Sections 6001 and 6008.3 may be exercised and carried out by action of its board of governors. In any resolution, indenture, contract, agreement, or other instrument providing for, creating, or otherwise relating to, any obligation of the State Bar, the board may make, fix, and provide such terms, conditions, covenants, restrictions, and other provisions as the board deems necessary or desirable to facilitate the creation, issuance, or sale of such obligation or to provide for the payment or security of such obligation and any interest thereon, including, but not limited to, covenants and agreements relating to fixing and maintaining membership fees.

**§ 6008.5 Pledge of membership fees; prohibition against reduction of maximum fee**

Whenever the board has pledged, placed a charge upon, or otherwise made available all or any portion of the income or revenue from membership fees for the payment or security of an obligation of the State Bar or any interest thereon, and so long as any such obligation or any interest thereon remains unpaid, the Legislature shall not reduce the maximum membership fee below the

maximum in effect at the time such obligation is created or incurred, and the provisions of this section shall constitute a covenant to the holder or holders of any such obligation.

#### **§ 6010. Board of governors in general**

The State Bar is governed by a board known as the board of governors of the State Bar. The board has the powers and duties conferred by this chapter.

#### **§ 6011. Number of members and president of state bar**

The board consists of 22 members and the President of the State Bar.

#### **§ 6012. Bar districts**

For the purpose of conducting elections of the attorney members of the board, the state is divided into State Bar districts constituted by combining counties and designated by numbers, as follows:

(a) State Bar District No. 1, comprising the following counties: Del Norte, Humboldt, Mendocino, Siskiyou, Modoc, Trinity, Shasta, Lassen, Plumas, Sierra, Tehama, Glenn, Colusa, Butte, Yuba, Sutter, Lake, Nevada and Placer.

(b) State Bar District No. 2, comprising the following counties: El Dorado, Amador, Calaveras, Alpine, Tuolumne, Mariposa, Mono, Sacramento, San Joaquin, Yolo, Napa, Solano, Sonoma and Marin.

(c) State Bar District No. 3, comprising the following counties: Contra Costa, Alameda and Santa Clara.

(d) State Bar District No. 4, comprising the City and County of San Francisco.

(e) State Bar District No. 5, comprising the following counties: Stanislaus, Merced, Madera, Fresno, Kings, Tulare and Kern.

(f) State Bar District No. 6, comprising the following counties: San Mateo, Santa Cruz, San Benito, Monterey, San Luis Obispo, Santa Barbara and Ventura.

(g) State Bar District No. 7, comprising the County of Los Angeles.

(h) State Bar District No. 8, comprising the following counties: Inyo, San Bernardino, Orange and Riverside.

#### **§ 6013. Membership from bar districts and young lawyers association**

The attorney membership of the board is composed of:

(a) One member from each of State Bar Districts 1, 2, 5, 6, 8 and 9.

(b) Two members from each of State Bar Districts 3 and 4.

(c) Five members from State Bar District 7.

(d) One member from the membership of the California Young Lawyers Association appointed pursuant to Section 6013.4.

**§ 6013.4. Member from Young Lawyers Association; term; vacancy**

Notwithstanding any other provision of law, one member of the board shall be elected by the board of directors of the California Young Lawyers Association, from the membership of that association.

Such member shall serve for a term of one year, commencing at the conclusion of the annual meeting next succeeding the election and is eligible for reelection. A vacancy shall be filled by election in the manner provided herein for the unexpired term.

**§ 6013.5. Public members; appointment; qualifications; term**

Notwithstanding any other provision of law, six members of the board shall be members of the public who have never been members of the State Bar or admitted to practice before any court in the United States. They shall be appointed through 1982 by the Governor, subject to the confirmation of the Senate.

Each of such members shall serve for a term of three years, commencing at the conclusion of the annual meeting next succeeding his appointment, except that for the initial term after enactment of this section, two shall serve for one year, two for two years, and the other two for three years, as determined by lot.

In 1983 one public member shall be appointed by the Senate Committee on Rules and one public member shall be appointed by the Speaker of the Assembly

For each of the years, 1984 and 1985, two public members shall be appointed by the Governor, subject to the confirmation of the Senate.

Each respective appointing authority shall fill any vacancy in and make any reappointment to each respective office.

**§ 6013.6. Attorney employee of public agency; member of board of governors; job-related benefit status**

(a) Except as provided in subdivision (b), any attorney who is a full-time employee of any public agency and who serves as a member of the Board of Governors of the State Bar shall not suffer any loss of rights, promotions, salary increases, retirement benefits, tenure, or other job-related benefits, which the attorney would otherwise have been entitled to receive.

(b) Notwithstanding the provisions of subdivision (a), any public agency which employs an attorney who serves as a member of the Board of Governors of the State Bar may reduce the attorney's salary, but no other right or job-related benefit, pro rata to the extent that the attorney does not work the number of hours required by statute or written regulation to be worked by other employees of the same grade in any particular pay period and the attorney does not claim available leave time. The attorney shall be afforded the opportunity to perform job duties during other than regular working hours if such a work arrangement is practical and would not be a burden to the public agency.



(c) The Legislature finds that service as a member of the Board of Governors of the State Bar by an attorney employed by a public agency is in the public interest.

This section shall remain in effect only until January 1, 1990, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1990, deletes or extends that date.

#### **§ 6014. Election of members; successive terms**

Five of the attorney members of the board are elected each year for terms of three years each.

No person shall be nominated for, or eligible to, membership on the board who has served as a member for three years next preceding the expiration of his current term, or would have so served if his current term were completed.

Within the meaning of this section, the time intervening between any two successive annual meetings is deemed to be one year.

#### **§ 6015. Qualifications of members**

No person is eligible for attorney membership on the board unless he or she is an active member of the State Bar and unless he or she maintains his or her principal office for the practice of law within the State Bar district from which he or she is elected.

One member of the board from State Bar District 7 elected in 1939, and any successor to this member, at the time of his or her election shall, and any member from

the district may, maintain his or her principal office for the practice of law outside of the City of Los Angeles.

#### **§ 6016. Tenure of members; vacancies; interim board**

The term of office of each attorney member of the board shall commence at the conclusion of the annual meeting next succeeding his election, and he shall hold office until his successor is elected and qualified.

Vacancies in the board of governors shall be filled by the board by special election or by appointment for the unexpired term.

The board of governors may provide by rule for an interim board to act in the place and stead of the board when because of vacancies during terms of office there is less than a quorum of the board.

#### **§ 6017. Terms of members from respective bar districts**

Members of the board shall be elected for terms of three years as follows:

(a) In 1939, one member each shall be elected from State Bar Districts 4, 6 and 8 two members from State Bar District 7.

(b) In 1940, one member each shall be elected from State Bar Districts 1, 3, 5, 7 and 9.

(c) In 1941, one member each shall be elected from State Bar Districts 2, 3 and 4 and two members shall be elected from State Bar District 7.

Thereafter, five members of the board shall be elected each year, each for three year terms, from the State Bar Districts in which vacancies will occur in that year by reason of the expiration of the term of office of a member theretofore elected thereto.

#### § 6018. Nominations; qualification to vote

Nominations of members of the board shall be by petition signed by at least twenty persons entitled to vote for such nominees.

Only active members of the State Bar maintaining their principal offices for the practice of the law in the respective State Bar districts shall be entitled to vote for the member or members of the board therefrom.

#### § 6019. Elections

Each place upon the board for which a member is to be elected shall for the purposes of the election be deemed a separate office.

If only one member seeks election to an office, the member is deemed elected. If two or more members seek election to the same office, the election shall be by ballot. The ballots shall be mailed to those entitled to vote at least twenty days prior to the date of canvassing. The ballots and shall be returned by mail to the principal office of the State Bar, where they shall be canvassed at least five days prior to the ensuing annual meeting. At the annual meeting, the count shall be certified and the result officially declared.

In all other respects the elections shall be as the board may by rule direct.

#### § 6020. Officers in general

The officers of the State Bar are a president, four vice presidents, a secretary and a treasurer. One of the vice presidents may also be elected to the office of treasurer.

#### § 6021. Election; time; assumption of duties

Within the period of 180 days next preceding the annual meeting, the board, at a meeting called for that purpose, shall elect the president, vice presidents and treasurer for the ensuing year. The president shall be elected from among those members of the board whose terms on the board expire that year, or if no such member is able and willing to serve, then from among the board members who have completed at least one or more years of their terms.

The other officers shall be elected from among the board members who have at least one or more years to complete their respective terms.

The newly elected president, vice presidents and treasurer shall assume the duties of their respective offices at the conclusion of the annual meeting following their election.

#### § 6022. Secretary

The secretary shall be selected annually by the board and need not be a member of the State Bar.

**§ 6023. Continuance in office**

The officers of the State Bar shall continue in office until their successors are elected and qualify.

**§ 6024. Duties of officers**

The president shall preside at all meetings of the State Bar and of the board, and in the event of his or her absence or inability to act, one of the vice presidents shall preside.

Other duties of the president and the vice presidents, and the duties of the secretary and the treasurer, shall be such as the board may prescribe. The president may vote only in the case of a tie vote of the other members of the board present and voting.

**§ 6025. Rules and regulations; determination as to meetings and quorum**

Subject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter.

The board shall by rule fix the time and place of the annual meeting of the State Bar, the manner of calling special meetings thereof and determine what number shall constitute a quorum of the State Bar.

**§ 6026. Reports; matters considered at meeting**

At the annual meeting, reports of the proceedings by the board since the last annual meeting, reports of other

officers and committees and recommendations of the board shall be received.

Matters of interest pertaining to the State Bar and the administration of justice may be considered and acted upon.

**§ 6026.5 Public meetings; exceptions**

Every meeting of the board shall be open to the public except those meetings, or portions thereof, relating to:

(a) Consultation with counsel concerning pending or prospective litigation.

(b) Involuntary enrollment of active members as inactive members due to mental infirmity or illness or addiction to intoxicants or drugs.

(c) The qualifications of judicial appointees, nominees, or candidates.

(d) The appointment, employment or dismissal of an employee, consultant, or officer of the State Bar or to hear complaints or charges brought against such employee, consultant, or officer unless such person requests a public hearing.

(e) Disciplinary investigations and proceedings, including resignations with disciplinary investigations or proceedings pending, and reinstatement proceedings.

(f) Appeals to the board from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate.



(g) Appointments to or removals from committees, boards, or other entities.

(h) Joint meetings with agencies provided in Article VI of the California Constitution.

#### § 6027. Special meetings

Special meetings of the State Bar may be held at such times and places as the board provides.

#### § 6028. Payment of expenses; compensation

(a) The board may make appropriations and disbursements from the funds of the State Bar to pay all necessary expenses for effectuating the purposes of this chapter.

(b) Except as provided in subdivision (c), no member of the board shall receive any other compensation than his or her necessary expenses connected with the performance of his or her duties as a member of the board.

(c) Public members of the board appointed pursuant to the provisions of Section 6013.5, public members of the examining committee appointed pursuant to Section 6046.5, and public members of the State Bar Court appointed pursuant to Section 6086.6 shall receive, out of funds appropriated by the board for this purpose, fifty dollars (\$50) per day for each actually spent in the discharge of official duties, but in no event shall this payment exceed five hundred dollars (\$500) per month. In addition, these public members shall receive, out of funds

appropriated by the board, necessary expenses connected with the performance of their duties.

#### § 6029. Appointment of committees, officers and employees; salaries and expenses

The board may appoint such committees, officers and employees as it deems necessary or proper, and fix and pay salaries and necessary expenses.

#### § 6030. Executive functions; enforcement of chapter; injunction

The board shall be charged with the executive function of the State Bar and the enforcement of the provisions of this chapter. The violation or threatened violation of any provision of Articles 7 (commencing with Section 6125) and 9 (commencing with Section 6150) of this chapter may be enjoined in a civil action brought in the superior court by the State Bar and no undertaking shall be required of the State Bar.

#### § 6031. Functions in aid of jurisprudence, justice, professional matters and public relations; evaluations of specific justices

(a) The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public.

(b) Notwithstanding this section or any other provision of law, the board shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature.

The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such an evaluation, review, or report in his or her individual capacity.

The provisions of this subdivision shall not be construed to prohibit an evaluation of potential judicial appointees or nominees as authorized by Section 12011.5 of the Government Code.

**§ 6032. Affirmative action and equal employment opportunity program; minority and women business enterprise program; study**

Subject to the approval of the Committees on Judiciary of each house of the Legislature, the board shall contract with an independent expert for the purpose of conducting a comprehensive study of the State Bar's affirmative action and equal employment opportunity program with regard to its employees, of assisting the State Bar with respect to those programs, and with developing and implementing a minority and women business enterprise program. A final report shall be submitted to

each of the Committees on Judiciary no later than September 1, 1989.

Moneys for the support of the independent expert shall be established and paid in accordance with the provisions of Section 6140.9.

**§ 6033. Malpractice insurance survey; report; costs**

(a) The board shall conduct a scientifically valid survey of a representative sample of the active membership for the purpose of compiling data on the subject of legal malpractice insurance.

Members shall fully and truthfully complete the survey or be subject to those discipline measures prescribed by the board. Survey responses shall be confidential.

(b) The board shall submit a final report on the results of the survey to the Legislature on or before December 15, 1987.

(c) For the 1988-89 fiscal year, the board may increase the annual membership fee fixed by subdivision (a) of Section 6140 by an additional amount not to exceed one dollar (\$1). This additional amount shall only be applied for costs incurred by the board in complying with the requirements of this section.

**§ 6063. Fees**

Applicants for admission to practice shall pay such reasonable fees, fixed by the board, as may be necessary to defray the expense of administering the provisions of this chapter, relating to admission to practice. These fees

shall be collected by the examining committee and paid into the treasury of the State Bar.

#### **§ 6064. Admission**

Upon certification by the examining committee that the applicant has fulfilled the requirements for admission to practice law, the Supreme Court may admit such applicant as an attorney at law in all the courts of this State and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court.

#### **§ 6076. Rules of professional conduct; formulation**

With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar in the State.

#### **§ 6077. Effect of rules; discipline for breach**

The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.

For a wilful breach of any of these rules, the board has power to discipline members of the State Bar by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar.

#### **§ 6078. Power to discipline and reinstate**

After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension or other discipline, the board has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproof, public or private, without such recommendation.

The board may pass upon all petitions for reinstatement.

#### **§ 6125. Necessity of active membership in state bar**

No person shall practice law in this State unless he is an active member of the State Bar.

#### **§ 6126. Unauthorized practice, advertising or holding out; penalties**

(a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor.

(b) Any person who has been involuntary enrolled as an inactive member of the State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail. However, any person who has been involuntarily enrolled as an inactive



member of the State Bar pursuant to paragraph (1) of subdivision (e) of Section 6007 and who knowingly thereafter advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail.

(c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 955, constitutes a crime punishable by imprisonment in the state prison or county jail.

**§ 6140. Membership fees; payment; duration of section**

(a) The board shall fix the annual membership fee for 1989 as follows:

(1) For active members who have been admitted to the practice of law in this state for three years or longer preceding the first day of February of the year for which the fee is payable, at the sum of two hundred forty-five dollars (\$245).

(2) For active members who have been admitted to the practice of law in this state for less than three years but more than one year preceding the first day of February of the year for which the fee is payable, at the sum of one hundred seventy-seven dollars (\$177).

(3) For active members who have been admitted to the practice of law in this state during, or for less than one year preceding the first day of February of, the year for which the fee is payable, at a sum not exceeding one hundred forty-six dollars (\$146).

(b) The board shall fix the annual membership fee for 1990 as follows:

(1) For active members who have been admitted to the practice of law in this state for three years or longer preceding the first day of February of the year for which the fee is payable, at the sum of two hundred sixty-eight dollars (\$268).

(2) For active members who have been admitted to the practice of law in this state for less than three years but more than one year preceding the first day of February of the year for which the fee is payable, at the sum of two hundred dollars (\$200).

(3) For active members who have been admitted to the practice of law in this state during, or for less than one year preceding the first day of February of, the year for which the fee is payable, at a sum not exceeding one hundred sixty-nine dollars (\$169).

(c) The annual membership fee for active members is payable on or before the first day of February of each year. If the board finds it appropriate and feasible, it may provide by rule for payment of fees on an installment basis with interest, by credit card, or other means, and may charge members choosing any alternative method of payment an additional fee to defray costs incurred by that election.

This section shall remain in effect only until January 1, 1991, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1991, deletes or extends that date.

**§ 6140.1. Proposed baseline and proposed final budgets; contents; fiscal bill; submission of documents; budget change proposals**

The State Bar annually shall submit its proposed baseline budget for the following fiscal year to the appropriate fiscal committees of the Legislature and the Joint Legislative Budget Committee by November 15, and its proposed final budget by February 15, so that the budget can be reviewed and approved in conjunction with any bill that would authorize the imposition of membership dues. Each proposed budget shall include the estimated revenues, expenditures, and staffing levels for all of the programs and funds administered by the State Bar. Any bill that authorizes the imposition of membership dues shall be a fiscal bill shall be referred to the appropriate fiscal committees; provided, however, that the bill may be approved by a majority vote.

The State Bar shall submit the budget documents in a form comparable to the documents prepared by state departments for inclusion in the Governor's Budget and the salaries and wages supplement. In addition, the bar shall provide supplementary schedules detailing operating expenses and equipment, all revenue sources, any reimbursements or interfund transfers, fund balances, and other related supporting documentation. The bar shall submit budget change proposals with its final budget, explaining the need for any differences between the current and proposed budgets.

**§ 6140.2. Reports to judiciary committees on procedural changes and improvements in disciplinary system; reduction of complaints in inventory; goal for timely disposition of complaints**

(a) On or before April 1, 1986, and June 1, 1986, the State Bar shall submit reports to the Judiciary Committees of the California State Senate and Assembly on the procedural changes and improvements which have been made in the State Bar disciplinary system and what effect these changes have had on the number of complaints pending, the time required to process these complaints, and the progress made in reducing the backlog of complaints.

(b) On or before December 31, 1987, the State Bar shall reduce by 80 percent the complaints within its inventory as of March 31, 1985, which have been received but have not resulted in dismissal, admonishment of the attorney involved, or filing of formal charges by State Bar Office of Trial Counsel. This reduction shall be accomplished by dismissal, admonishment of the attorney involved, or recommendation by the State Bar for disposition by the Supreme Court.

(c) The State Bar shall set as a goal by December 31, 1987, the improvement of its disciplinary system so that no more than six months will elapse from the receipt of complaints to the time of dismissal, admonishment of the attorney involved, or the filing of formal charges by the State Bar Office of Trial Counsel.

**§ 6140.3. Increases in membership fees; use of funds; submission of facility construction plan and cost estimate**

(a) The board may increase the annual membership fee fixed by subdivision (a) of Section 6140 and the annual membership fee specified in Section 6141 by an additional amount not exceeding ten dollars (\$10). This additional amount may be used only for (1) the costs of financing and constructing a facility in Los Angeles to house State Bar staff and (2) any major capital improvement projects related to facilities owned by the bar.

(b) At least 30 days prior to entering into any agreement for the construction of a facility in Los Angeles, the State Bar shall submit its preliminary plan and cost estimate for the facility to the Judiciary Committees of the Legislature for review. The documents submitted shall include an analysis demonstrating that the total costs of financing and constructing the facility can be supported by the revenues authorized by this section.

**§ 6140.35. Progress reports; duration of section**

(a) The board shall annually present written and oral progress reports on all State Bar programs to the Judiciary Committees of the Senate and Assembly, as directed by those committees.

(b) This section shall remain in effect until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1992, deletes or extends that date.

**§ 6140.4. Discipline augmentation; increase in membership fee; duration of section**

(a) The board may increase the annual membership fee fixed by it pursuant to Section 6140 by an additional fee for discipline augmentation of not more than one hundred ten dollars (\$110) for 1989, 1990, and 1991, respectively, for all active members.

(b) This augmentation shall be in addition to existing levels of expenditure for discipline as established during 1987 for 1988.

(c) The board may apply up to one hundred ten dollars (\$110) of the discipline enhancement fees during 1989, 1990, or 1991 to pay disciplinary expenses beyond fee receipts for 1988 and 1989.

(d) This section shall remain in effect until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1992, deletes or extends that date.

**§ 6140.5. Client security fund; subrogation to applicant's rights; reimbursement by attorneys**

(a) The board shall establish and administer a Client Security Fund to relieve or mitigate pecuniary losses caused by the dishonest conduct of the active members of the State Bar arising from or connected with the practice of law. Any payments from the fund shall be discretionary and shall be subject to such regulation and conditions as the board shall prescribe. The board may delegate the administration of the fund to the State Bar Court, or to any board or committee created by the board of governors.



(b) Upon making a payment to a person who has applied to the fund for payment to relieve or mitigate pecuniary losses caused by the dishonest conduct of an active member of the State Bar, the State Bar is subrogated, to the extent of that payment, to the rights of the applicant against any person or persons who, or entity that, caused the pecuniary loss. The State Bar may bring an action to enforce those rights within three years from the date of payment to the applicant.

(c) Any attorney whose actions have caused the payment of funds to a claimant from the client security fund shall reimburse the fund for all moneys paid out as a result of his or her conduct with interest, in addition to payment of the assessment for the procedural costs of processing the claim, as a condition of continued practice. The reimbursed amount, plus applicable interest and costs, shall be added to and become a part of the membership fee of a publicly reprovved or suspended member for the next calendar year. For a member who resigns with disciplinary charges pending or a member who is suspended or disbarred, the reimbursed amount, plus applicable interest and costs, shall be paid as a condition of reinstatement of membership.

**§ 6140.55. Client security fund; costs of administration; increase in membership fee**

The board may increase the annual membership fees fixed by it pursuant to Section 6140 by an additional amount per active member not to exceed twenty-five dollars (\$25) in any year, the additional amount to be applied only for the purposes of the Client Security Fund and the costs of its administration, including, but not

limited to, the costs of processing, determining, defending, or insuring claims against the fund.

**§ 6140.6 Increase in membership fee; application to costs of disciplinary system**

The board may increase the annual membership fee fixed by subdivision (a) of Section 6140 by an additional amount not to exceed twenty-five dollars (\$25) to be applied to the costs of the disciplinary system.

**§ 6140.7. Costs assessed publicly reprovved or suspended member; addition to membership fee; payment of costs conditional to reinstatement of membership after resignation with disciplinary charges pending**

Costs assessed against a publicly reprovved or suspended member shall be added to and become a part of the membership fee of the member, for the next calendar year. Costs unpaid by a member who resigns with disciplinary charges pending or by a member who is suspended or disbarred shall be paid as a condition of reinstatement of membership.

**§ 6140.8. State bar discipline monitor; termination date; final report and recommendations**

The term of the State Bar Discipline Monitor shall terminate on January 1, 1992. On September 20, 1991, the monitor shall issue a final report to the Legislature on the implementation of reforms and the performance of the State Bar thereunder, with final recommendations for legislative and budgetary changes in the discipline-competence assurance process of the State Bar.

**§ 6141. Inactive members; fee; age exception**

(a) The board shall fix the annual membership fee for inactive members at a sum not exceeding forty dollars (\$40). The annual membership fee for inactive members is payable on or before the first day of February of each year.

(b) An inactive member shall not be required to pay the annual membership fee for inactive members for any calendar year following the calendar year in which the member attains the age of 70 years.

**§ 6141.1. Waiver of membership fee or penalty; proof of financial hardship**

The payment by any member of the annual membership fee, any portion thereof, or any penalty thereon, may be waived by the board as it may provide by rule. The board may require submission of recent federal and state income tax returns and other proof of financial condition as to those members seeking waiver of all or a portion of their fee or penalties on the ground of financial hardship.

**§ 6142. Certificate of payment**

Upon the payment of the annual membership fees, including any costs imposed pursuant to Section 6140.7, and penalties imposed pursuant to Section 6143, each member shall receive a certificate issued under the direction of the board evidencing the payment.

**§ 6143. Suspension for nonpayment and reinstatement; penalties**

Any member, active or inactive, failing to pay any fees, penalties, or costs after they become due, and after two months written notice of his or her delinquency, shall be suspended from membership in the State Bar.

The member may be reinstated upon the payment of accrued fees or costs and such penalties as may be imposed by the board, not exceeding double the amount of delinquent dues, penalties, or costs.

**§ 6144. Disposition of fees**

All fees shall be paid into the treasury of the State Bar, and, when so paid, shall become part of its funds.

**§ 6145. Annual statement**

The board annually shall prepare a statement showing the total amount of receipts and expenditures of the State Bar for the twelve months preceding. The statement shall be promptly certified under oath by the president and treasurer to the Chief Justice of the Supreme Court.

---

FILED  
DEC 19 1960

JOSEPH P. SPANGL, JR.  
CLERK

**Court**

1960

1960

1960

1960

1960

1960

1960

1960

1960

1960

1960

1960



## TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED .....	1
STATEMENT OF FACTS .....	2
A. Procedural History .....	2
B. The History of the State Bar and Its Activities .....	4
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	10

### I.

THE CHALLENGED STATE BAR ACTIVITIES DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF DISSENTELS .....	10
A. The State Bar of California Is Part of the Democratic Structure Of Government .....	10
B. California's Determination of the Nature of Its Bar And Scope Of Its Authorized Activities Is A Matter of State Law .....	12
C. The State Bar's Public Purpose And Role In The State Governmental System Place Its Ac- tivities Squarely Within Government Speech Doctrine .....	15
1. The Test For Government Speech Is Ra- tional Relationship To A Legitimate Gov- ernmental End .....	15
2. The Source of the Funds Does Not Change the Result .....	18
3. The State Bar's Speech Is Rationally Re- lated To A Legitimate Governmental End .....	20
a. Amicus Briefs Are Properly Within The State Bar's Province .....	20
b. The State Bar's Lobbying Is Proper ..	22

## TABLE OF CONTENTS

	<u>Page</u>
c. The Conference Of Delegates' Speech Should Not Be Restrained .....	23
D. No Protected Associational Rights Are Violated.....	24
1. The Associational Rights At Stake Are Limited .....	24
a. No Intimate Association Is Implicated	25
b. No Expressive Association Is Restrained.....	25
2. The State Bar Does Not Compel Petitioners To Affirm Any Belief .....	27
E. The Different Purposes Of Integrated Bars And Labor Unions Mandate Different Constitutional Treatment .....	29

## II.

UNDER THE ABOVE PRINCIPLES, THE CHALLENGED ACTIVITIES ARE PROPER.....	32
A. The Union Cases Permit Activities Germane To The Organization's Purpose .....	32
B. The State Bar Is Not Required To Justify Its Activities By A Compelling State Interest ...	34
C. The Challenged Activities Are Germane And Their Importance Outweighs Any Collateral Effect On First Amendment Rights .....	35
1. The Administration Of Justice Is An Appropriate Standard For Measuring State Bar Activities .....	35
2. The Challenged Activities Are Germane To The Authorized Purposes Of The State Bar	38

## TABLE OF CONTENTS

	<u>Page</u>
3. The State Interest Outweighs Any Impingement On Dissenters' First Amendment Interests.....	40
D. The Strict Scrutiny Standard of Review Does Not Alter The Result .....	42
1. Strict Scrutiny Does Not Apply To The State Bar's Activities .....	42
2. The State Bar's Activities Survive Strict Scrutiny .....	45
CONCLUSION .....	47
APPENDIX A California Statutes	

## TABLE OF AUTHORITIES CITED

## Cases

	<u>Page</u>
<i>Abood v. Detroit Board of Educ.</i> , 431 U.S. 209, 52 L.Ed. 261, 97 S.Ct. 1782 (1977) ..15, 17, 32, 33, 34	
<i>American Party of Texas v. White</i> , 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974) .....	15
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292, 89 L.Ed.2d 232, 106 S.Ct. 1066 (1986) .....	33
<i>Chronicle Publishing Co. v. Superior Court</i> , 54 Cal.2d 548, 7 Cal.Rptr. 109, 354 P.2d 637 (1960)	5
<i>City of Dallas v. Stanglin</i> , 490 U.S. —, 104 L.Ed.2d 18, 109 S.Ct. 1591 (1989) .....	24
<i>Common Cause v. Bolger</i> , 574 F.Supp. 672 (D.D.C. 1982), <i>aff'd</i> , 461 U.S. 911, 77 L.Ed.2d 280, 103 S.Ct. 1888 (1983) .....	15
<i>Consolidated Edison v. Public Service Commission</i> , 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326 (1980) .....	24
<i>Ellis v. Brotherhood of Railway, Airline &amp; Steam- ship Clerks</i> , 466 U.S. 435, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984) .....	23, 32, 33, 46, 47
<i>Erzinger v. Regents of the University of California</i> , 137 Cal.App.3d 389, 187 Cal.Rptr. 164 (1982), <i>cert. denied</i> , 462 U.S. 1133, 77 L.Ed.2d 1368, 103 S.Ct. 3114 (1983) .....	18, 27
<i>Falk v. State Bar of Michigan</i> , 418 Mich. 270, 342 N.W.2d 504 (1981), <i>cert. denied</i> , 469 U.S. 925, 83 L.Ed.2d 253, 105 S.Ct. 315 (1985) .....	45
<i>F.C.C. v. League of Women Voters of California</i> , 468 U.S. 364, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984) 16, 43	

## TABLE OF AUTHORITIES CITED

## CASES

	<u>Page</u>
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978) .....	23
<i>Galda v. Bloustein</i> , 686 F.2d 159 (3d Cir. 1982), <i>cert. denied</i> , 475 U.S. 1065, 89 L.Ed.2d 602, 106 S.Ct. 1375 (1986) .....	27
<i>Garner v. Teamsters Local 776</i> , 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953) .....	14
<i>Gibson v. the Florida Bar</i> , 798 F.2d 1564 (11th Cir. 1986) .....	44, 45
<i>Goode v. Associated Students of the University of Washington</i> , 541 P.2d 762, 86 Wash.2d 94 (1975)	27
<i>Herron v. The State Bar</i> , 212 Cal. 196, 298 P. 474 (1931) .....	10, 11, 42
<i>Hishon v. King &amp; Spalding</i> , 467 U.S. 69, 81 L.Ed.2d 59, 104 S.Ct. 2229 (1984) .....	22, 25
<i>Hollar v. Government of the Virgin Islands</i> , 857 F.2d 163 (3d Cir. 1988) .....	38, 44, 45
<i>Keller v. State Bar of California</i> , 47 Cal.3d 1152, 255 Cal.Rptr. 542 (1989) .....	passim
<i>Lathrop v. Donohue</i> , 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961) .....	passim
<i>Lehane v. City and County of San Francisco</i> , 30 Cal.App.3d 1051, 106 Cal.Rptr. 918 (1972), <i>ap- peal dismissed</i> , 410 U.S. 962, 35 L.Ed.2d 698, 93 S.Ct. 1445 (1973) .....	22
<i>Levine v. Heffernan</i> , 864 F.2d 457 (7th Cir. 1988), <i>cert. denied</i> , — U.S. —, 107 L.Ed.2d 157, 110 S.Ct. 204 (1989) .....	34, 38



## TABLE OF AUTHORITIES CITED

## CASES

	<u>Page</u>
<i>Mallard v. United States District Court</i> , 490 U.S. _____, 104 L.Ed.2d 318, 109 S.Ct. 1814 (1989) .....	31, 37, 45
<i>Miller v. California Commission on the Status of Women</i> , 151 Cal.App.3d 693, 198 Cal.Rptr. 877, appeal dismissed for want of jurisdiction, 469 U.S. 806, 83 L.Ed.2d 15, 105 S.Ct. 64 (1984) ..	16, 17
<i>Muir v. Alabama Educational Television Commission</i> , 688 F.2d 1033 (5th Cir. 1982), cert. denied, 460 U.S. 1023, 75 L.Ed.2d 495, 103 S.Ct. 1274 (1983) .....	16
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734, 10 L.Ed.2d 670, 83 S.Ct. 1453 (1963) .....	29
<i>Pacific Gas &amp; Elec. v. California P.U.C.</i> , 475 U.S. 1, 89 L.Ed.2d 1, 106 S.Ct. 903 (1986) .....	16, 17, 28, 31
<i>P.A.M. News Corp. v. Butz</i> , 514 F.2d 272 (D.C. Cir. 1975) .....	24
<i>Posadas de Puerto Rico Ass'n v. Tourism Co.</i> , 478 U.S. 328, 92 L.Ed.2d 266, 106 S.Ct. 2968 (1986) ..	14
<i>PruneYard Shopping Center v. Robins</i> , 477 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980) .....	41
<i>Railway Employees' Dept. v. Hanson</i> , 351 U.S. 225, 100 L.Ed. 1112, 76 S.Ct. 714 (1956) .....	34
<i>Regan v. Tazation with Representation of Washington</i> , 461 U.S. 540, 76 L.Ed.2d 129, 103 S.Ct. 1997 (1983) .....	15
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984) .....	25, 26, 40, 42

## TABLE OF AUTHORITIES CITED

## CASES

	<u>Page</u>
<i>Royall v. Virginia</i> , 116 U.S. 572, 29 L.Ed. 735, 6 S.Ct. 510 (1886) .....	19
<i>Sams v. Olah</i> , 225 Ga. 497, 169 S.E.2d 790 (1969), cert. denied, 397 U.S. 914, 25 L.Ed.2d 94, 90 S.Ct. 916 (1970) .....	38
<i>Schware v. Board of Bar Examiners</i> , 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752 (1957) .....	13
<i>Standard Oil of Calif. v. Johnson</i> , 316 U.S. 481, 86 L.Ed. 1611, 62 S.Ct. 1168 (1942) .....	14
<i>Stanson v. Mott</i> , 17 Cal.3d 206, 130 Cal.Rptr. 697 (1976) .....	3, 13, 16, 44, 45
<i>State Bar of California v. Superior Court</i> , 207 Cal. 323, 278 P. 432 (1929) .....	11, 31
<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989) .....	18
<i>United States v. Lee</i> , 455 U.S. 252, 71 L.Ed.2d 127, 102 S.Ct. 1051 (1982) .....	18
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943) .....	28
<i>Wooley v. Maynard</i> , 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977) .....	28, 40
<i>Young Americans For Freedom v. Gorton</i> , 91 Wash.2d 204, 588 P.2d 195 (Wash. 1978) .....	20

## TABLE OF AUTHORITIES CITED

## Constitution

	<u>Page</u>
California Constitution art. VI §§ 6, 8 .....	5
California Constitution article VI § 9 .....	4

## Statutes

California Business & Professions Code	
§ 6000.....	4
§ 6002.....	4
§ 6008, 6008.2 .....	6
§ 6012, 6013, 6013.4, 6013.5 .....	5
§ 6026.5 .....	6
§ 6031(a) .....	2, 4
§ 6031(b) .....	17
§ 6046, 6060 .....	4
§ 6076.5 .....	4
§ 6077.....	4
§ 6140.5 .....	12
§ 16100.....	19
California Rules of Professional Conduct 3-320 ..	21
Code of Civil Procedure § 2016.....	11
Government Code	
§ 8287.....	5, 43
§ 12011.5 .....	5, 43
§§ 20000.....	6
§§ 20009.....	6
§§ 20009.1 .....	6
§§ 68725.....	43

## TABLE OF AUTHORITIES CITED

## STATUTES

	<u>Page</u>
National Labor Relations Act § 2(5) .....	29
16 U.S.C. § 4601-6 .....	22
29 U.S.C. § 141.....	14
29 U.S.C. § 152(5) .....	30
45 U.S.C. § 151.....	14

## Miscellaneous

L. Tribe, American Constitutional Law § 12-4 at 807 (1988) .....	15
---	----

No. 88-1905

In the Supreme Court  
OF THE  
United States

OCTOBER TERM 1988

EDDIE KELLER, ET AL

v.

STATE BAR OF CALIFORNIA, ET AL

On Petition For Writ of Certiorari  
To The Supreme Court of California

RESPONDENTS' BRIEF ON THE MERITS

ISSUES PRESENTED

The questions certified for review, as framed by the Petitioners, require a resolution of the following central issues:

1. Whether a state may constitutionally establish a state bar as a state agency for the purposes of both regulating the profession and improving the administration of justice; and, if so,
2. Whether activities of the State Bar of California, authorized by state law to promote those purposes, including lobbying, amicus briefs, and membership conferences, may be funded with compelled fees?

The first of these questions was answered affirmatively by this Court in *Lathrop v. Donohue*. The answer to the second, as shown below, is also affirmative.



## STATEMENT OF FACTS

### A. Procedural History

This action was filed by 21 past and present members of the State Bar of California,<sup>1</sup> seeking to enjoin a broad range of activities by the State Bar that they oppose. According to petitioners, the use of the fees they are statutorily required to pay to the State Bar violates their First Amendment rights. Petitioners seek to enjoin the State Bar from proceeding with all activities outside of the area of admissions, discipline, and regulation of practice.

Petitioners challenged generally all activities engaged in by the State Bar pursuant to its charge under California Business & Professions Code (hereinafter "Bus. & Prof. Code") § 6031(a), to promote "the improvement of the administration of justice." They included in their pleadings below a partial list of specific matters, which, they contended, show these activities were objectionable. Petitioners challenged all "lobbying [of] the California State Legislature on various matters," "submitting of briefs amicus curiae in various cases," and "financing meetings of the Conference of Delegates."<sup>2</sup> Joint Appen-

<sup>1</sup>Certain petitioners are not now active members of the State Bar. See Petitioners' Brief at 5 fn.2.

<sup>2</sup>Petitioners also challenged specifically the 1982 inaugural speech of the State Bar president and the circulation by the State Bar of a copy of the speech and other materials pertaining to California's November election to confirm six justices of the state's high court. In the opinion below, the California Supreme Court found that the speech and materials were prohibited campaign activities under state law because of the nature of parts of the materials and the timing of their release. *Keller v. State Bar of California*, 47 Cal. 3d 1152, 1172, 255 Cal. Rptr. 542 (1989). However, the Court found that the Board

dix at 4-5. They characterized all such activities of the State Bar as "political" or "ideological." *Id.*

Petitioners' motion for preliminary injunction was denied on March 4, 1983. (Joint Appendix 222-24) Following extensive discovery, respondents filed a motion for summary judgment; judgment was granted in favor of all defendants on May 24, 1984. (Joint Appendix 477-79) After Petitioners unsuccessfully sought a writ of mandate, they appealed to the California Court of Appeal. The Court of Appeal reversed the grant of summary judgment (Joint Appendix 480-536).

The California Supreme Court disagreed. It found that the State Bar, as a governmental entity, is entitled to use its revenues for any purpose properly within its statutory authority, subject to the limitations on government speech applicable to all state agencies in California to protect First Amendment rights. *See Stanson v. Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697 (1976). Accordingly, the California Supreme Court reinstated the summary judgment as to all issues except the educational campaign on judicial retention, approving the State Bar's lobbying of the Legislature, filing of amicus briefs, and financing of meetings of the Conference of Delegates. (Joint Appendix 556-620)

of Governors could reasonably believe that these activities were authorized by law and therefore was not personally liable for the related expenditures, as contended by petitioners. *Id.* at 1172-73. Petitioners do not seek review of that part of the opinion by this Court, acknowledging that the California Supreme Court resolved both claims on state law grounds. Pet'n for Writ of Cert. at 4 n.1; Opening Brief at 6 n.3.

## B. The History of the State Bar and Its Activities

The State Bar was created as a public entity in 1927 and established by the voters as a constitutional agency in both 1960 and 1966. *See* article VI, § 9, California Constitution (establishing the State Bar of California as a public corporation). The parallel legislative enactment, establishing the State Bar as a public corporation and enumerating its powers, is the State Bar Act, Business & Professions Code §§ 6000, et seq. The creation of the State Bar in 1927 was in part prompted by concerns about inadequate professional standards and competence and by widespread recognition of the need for assistance in legal reform and improvement of judicial administration. All persons admitted and licensed to practice law in California except justices and judges of courts of record during their service in office are members of the State Bar. Bus. & Prof. Code § 6002.

The State Bar performs regulatory, adjudicative and informational functions. The State Bar regulates the admission to the practice of law. *See* Bus. & Prof. Code §§ 6046, 6060. Subject to Supreme Court oversight, it has the power to formulate rules of professional conduct, Bus. & Prof. Code § 6076.5, and to discipline members who breach them, Bus. & Prof. Code § 6077. In adjudicating disciplinary violations, the State Bar complies with due process requirements of notice and hearing. *In re Petersen*, 208 Cal. 42, 45, 280 P. 124 (1929). The State Bar also enforces rules against unlawful practice and illegal solicitation, provides an arbitration system for fee disputes, and maintains a client security fund. (Joint Appendix at 563)

The Legislature also has empowered the State Bar to carry on activities to improve the administration of justice and to advance the science of jurisprudence. Bus. &

Prof. Code § 6031 (a). The State Bar's programs assist all branches of state government. For example, the State Bar appoints four members of the Judicial Council, and two members of the Commission on Judicial Performance. Cal. Const. art. VI, §§ 6, 8. It assists the Law Revision Commission, Gov't Code § 8287, and is required to evaluate the qualifications of the governor's judicial nominees. Gov't Code § 12011.5. (*See also* Joint Appendix at 564.) The State Bar also uses the expertise of California's attorneys to inform other governmental agencies and the public on law-related issues through activities such as lobbying and filing *amicus* briefs. Petitioners challenge these activities in a general manner, but, in fact, the lobbying and *amicus* activities of the State Bar are closely tied to issues concerning the legal system.<sup>3</sup>

A 23-person Board of Governors, consisting of a president elected by and from members of the Board, 15 members elected by lawyers from 9 geographical districts, 1 member from the California Young Lawyers Association and 6 members of the public appointed by the governor and officials of the legislature, administers the State Bar. Bus. & Prof. Code §§ 6012, 6013, 6013.4, 6013.5. Members of the Board of Governors are public officers, acting under oath. *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 566, 7 Cal. Rptr. 109, 354 P.2d 637 (1960). Members of the Board and State Bar employees are also subject to state law relating to disclosure of financial

<sup>3</sup>The specific activities identified in the complaint are not supported by the record and were denied by the State Bar (Joint Appendix at 37). The items for which lobbying was approved for 1982 (set forth at Joint Appendix 165-92) show the concentration of Bar activities in areas in which it has special expertise and professional obligations. *See, e.g., id.* at 175 (assigned counsel compensation and standards).

interests and conflicts of interest. *See* Gov't Code §§ 87100, et seq. State Bar employees are participants in the State Retirement Fund. Gov't Code §§ 20000, et seq.; 20009, 20009.1.

The State Bar is financed and regulated as a governmental agency. It funds its activities primarily through fees authorized by the Legislature, based on a report submitted by the State Bar of all its projected activities and anticipated funding needs.<sup>4</sup> *See* Decl. of M. Wailes and Ex. 2 to Defendants' Opposition to Motion for Preliminary Injunction, (Joint Appendix at 155-197; 75-125). All property of the State Bar is held for "essential public and governmental purposes in the judicial branch of government" and is tax exempt. Bus. & Prof. Code §§ 6008, 6008.2. Except for certain confidential proceedings, all meetings of the Board of Governors must be open to the public. Bus. & Prof. Code § 6026.5.

The State Bar began activities to address the public concerns that led to its formation immediately. Many of the programs begun by the State Bar in its early years have lasted in one form or another over the more than 60 years of its existence and were well in place when the voters gave the State Bar constitutional authorization. For example, even in the earliest years of the Bar, and

---

<sup>4</sup>The detailed information provided to the Legislature includes the State Bar's regular public disclosures of the nature and extent of its lobbying activities and expenses. For example, the State Bar quarterly files forms entitled "Report of Lobbyist Employer" with the Secretary of State, reporting, in detail, all of its lobbying activities, including the names of its lobbyists, the bills on which they communicated, and the expenses incurred. *See, e.g.*, Joint Appendix at 236-52. In addition, the State Bar's reports to the Legislature, submitted in connection with the fees bill, provide detailed descriptions of all its programs and activities. *See, e.g.*, Joint Appendix at 114-34, 126-54, 260-62.

throughout its history, it has sponsored programs to improve delivery of legal services to the poor, to promote reform in procedural and substantive areas of law, and to educate the public about issues affecting the State Bar.<sup>5</sup> From its inception, the Bar organized sections of members to study and propose legal reform in specific areas of law. It also facilitated meetings of its members to discuss current legal issues in an open forum, now the Conference of Delegates.<sup>6</sup> Nor is legislative activity new to the State Bar. One of the most effective ways in which the State Bar has fulfilled its obligations to advance the science of jurisprudence and to improve the administration of justice has been to suggest and promote legislation, and to provide assistance to the Legislature.

## SUMMARY OF ARGUMENT

This case presents the Court with two starkly contrasting views of the legal profession. The first, as chosen by the people and Legislature of the State of California through constitutional and legislative enactments, envisions the legal profession as serving the public interest by aiding in the administration of justice and regulating the legal profession. The second, advanced by Petitioners in this lawsuit, envisions a group with far more limited

---

<sup>5</sup>A detailed discussion of the history of the State Bar and its activities is included in the Declaration of Magdalene Y. O'Rourke (Joint Appendix at 198-213).

<sup>6</sup>The list of topics presented at the 1982 Conference of Delegates (Joint Appendix at 369-382) and the results of the 1980 and 1981 resolutions (Joint Appendix at 382-409) show a vast disparity between Petitioners' descriptions and the reality. *See also* Declaration of Truitt A. Richey listing *amicus curiae* activity (Joint Appendix at 439-56).



obligations, bound together by the State for the sole purpose of admitting and disciplining lawyers.

Petitioners ask this Court to override California's policy decision to request the lawyers of California to undertake these tasks through an integrated bar that is part of State government. Seeking to substitute their own narrow view of lawyers' professional obligations for that chosen by the State, they ask this Court to limit the State Bar's activities to regulation of the admission and discipline of lawyers. In so doing, Petitioners request this Court to ignore the California Supreme Court's interpretation of the State Bar's purposes, as well as its ruling that the State Bar is a governmental entity whose activities are subject to established rules relating to government speech.

Petitioners are not free to characterize the State Bar to suit the purposes of their lawsuit. The improvement of the administration of justice is as central to the integration of the bar as is the regulation of lawyers. Indeed, California adopted the concept of the integrated bar to serve that goal, and to provide a mechanism for individual lawyers to discharge their professional responsibilities. Nearly thirty years ago, in *Lathrop v. Donohue*, this Court approved compulsory membership in an integrated bar that, like the State Bar of California, both regulated the profession and aided in the administration of justice.

The ruling below defines the scope of the State Bar's role in the administration of justice sufficiently to enable the State Bar to fulfill its mandated role in state government, while protecting First Amendment rights. Thus, the court below properly upheld the State Bar's authorization to communicate with the Legislature, file *amicus* briefs, and hold its annual meetings of the Conference of Delegates. The court specifically held that these activities

were authorized under state law, and did not violate the First Amendment. In their categorical challenge to the State Bar's activities, Petitioners have not claimed that these activities were not authorized; they limit their claims to the principles applied to labor unions, and not to governmental agencies. However, the challenged State Bar activities constitute actions by government, and are measured by the standards of government speech. Under those tests, the activities are appropriate.

The State Bar's activities add to the totality of speech in the public arena, while posing only the most minimal burdens on Petitioners, and no more than are borne by other taxpayers who disagree with governmental messages. The attenuated link between Petitioners, 21 of California's 122,000 lawyers, and the speech of the State Bar, is too weak to support their claimed negative rights of speech and association.

Petitioners ask this Court to reject the standard applicable to government speech and substitute instead the standard applicable to labor union activities. However, the vast differences between the State Bar's purposes and those of private economic organizations militate against application of the same standard to both. Moreover, the challenged activities are constitutional even if measured by the actual standards of the union cases. Germaneness is the measure of permissible union activities and the State Bar's activities in advising the Legislature of its position on various pending measures, filing of *amicus* briefs and holding of the Conference of Delegates clearly are germane to the administration of justice and the regulation of the profession. Petitioners' insistence that the union cases require the State Bar to prove that its activities further a compelling state interest finds no support in the cases that they cite.

Finally, the public interest in improving the legal system is compelling enough to justify the State Bar's activities even under the inapplicable strict scrutiny standard urged by Petitioners. Petitioners have identified no less restrictive means for the State Bar to achieve its goal, and given the nature of the State Bar's functions, no such means exist. To impose limitations on the State Bar's activities beyond those imposed by the decision below would severely hamper the State Bar's ability to fulfill its many mandated and permissible functions.

The State Bar urges this Court not to deprive the states of their ability to choose the appropriate means to develop their legal systems, or to deprive California of the important contributions the State Bar makes to its governance. Ironically, Petitioners here seek to prevent the State Bar from continuing its very constructive role by silencing it, claiming that the First Amendment should prevent such speech. In affirming the decision below, this Court will avoid silencing the State Bar of California, and reaffirm the right of the states to ensure that their bars continue to serve the interests of the public in the highest professional tradition.

## ARGUMENT

### I.

#### THE CHALLENGED STATE BAR ACTIVITIES DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF DISSENTERS

##### A. The State Bar Of California Is Part of the Democratic Structure Of Government

The State Bar of California serves essential public purposes that have been recognized by numerous decisions of the California Supreme Court. *See, e.g., Herron v.*

*The State Bar*, 212 Cal. 196, 199, 298 P. 474 (1931); *State Bar of California v. Superior Court*, 207 Cal. 323, 330-31, 278 p. 432 (1929). This Court approved mandatory membership to serve similar interests in *Lathrop v. Donohue*, 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961). California's statutory scheme outlined above carefully defines these functions; it is refined through regular oversight of the Bar's activities by the democratically-elected legislature. The authorization is both detailed and explicit,<sup>7</sup> and is enforced through the legislature's control of the State Bar's budget, based on detailed submissions on expenditures.

The State Bar recognizes that its status as a governmental entity is not a license to use the compelled fees of the State's practicing attorneys for unlimited purposes. Rather, the State Bar acts within the scope of its statutory authority,<sup>8</sup> both implicit and explicit, when attempting to inform its members, the public, the legislature and the judiciary on important issues concerning the state legal system.<sup>9</sup> The State Bar itself provides other protec-

<sup>7</sup> Other states, by contrast, have not chosen to regulate their lawyers in this manner. No reported decision holds any other state bar to be a governmental agency with the explicit, detailed authorization given to the State Bar of California.

<sup>8</sup> *Keller, supra*, 47 Cal. 3d at 1169-70. Petitioners could not and did not show that any of the activities they challenge are outside the scope of the State Bar's authorization; the record below, setting forth the nature and scope of its activities, demonstrates that the activities are authorized. *See* Minute Order, Superior Court, March 19, 1984 (specifically finding that all of the challenged activities are statutorily authorized). (Joint Appendix at 478.)

<sup>9</sup> A Joint Commission on Discovery, made up of representatives of the State Bar and the Judicial Council, recommended a package of reforms in civil discovery which were adopted in the Civil Discovery Act of 1986, Code of Civil Procedure § 2016, et seq. This joint project

tions that ensure each lawyer a fair opportunity to be heard. *See infra* at pp. 17-18.

### B. California's Determination of the Nature of Its Bar And The Scope Of Its Authorized Activities Is A Matter Of State Law

The highest court in California has ruled that the State Bar of California, a creation of state law, is governmental in nature. *Keller, supra*, 47 Cal. 3d at 1162-65. Petitioners

---

of the State Bar and the Judicial Council was possible only because both the Judicial Council and the State Bar are governmental entities. *See California Lawyer*, Dec. 1985, at 78; *California Lawyer*, Dec. 1986, at 84.

The State Bar was a co-sponsor of AB 3300, the Trial Court Delay Reduction Act (Brown). Subsequently, the State Bar and the Judicial Council formed a Statewide Delay Reduction Consortium, focusing on implementation of delay reduction. This joint effort to implement one of the most important current reforms in the administration of justice would not be possible outside the structure of the unified bar. *See California Lawyer*, Dec. 1987, at 75.

The State Bar and its committees and sections provide assistance to the Legislature on many legislative proposals affecting the administration of justice. By virtue of the integrated bar structure, the State Bar provides a balanced perspective, resulting from bar entities reflecting the diversity of the legal profession.

Because of the integrated bar structure in California, the Legislature is able to view the regulation of the legal profession in far broader terms than traditional admissions and discipline. For example, the Legislature recently adopted legislation calling upon the State Bar to regulate both not-for-profit and for-profit lawyer referral services based on rules adopted by the Supreme Court of California. *See California Lawyer*, Dec. 1986, at 79, 85. Another example is client protection through the Client Security Fund, Bus. & Prof. Code § 6140.5, and the availability of professional liability insurance for lawyers.

have conceded this fact.<sup>10</sup> (Petition at 4, fn. 1; Brief at 6, fn.3.) In addition, the California Supreme Court has determined that all of the challenged activities, with the exception of participation in judicial elections, are authorized by the explicit and implicit mandates of legislative enactments and constitutional provisions. *Keller, supra*, 47 Cal. 3d at 1169-72. Thus, in this case, it has now been conclusively determined under state law that 1) the State Bar is a governmental entity; 2) it is charged with both regulating attorneys and improving the administration of justice; and 3) all the challenged activities are authorized by California law.

The regulation of lawyers is a matter traditionally left to the states. *See e.g., Schwabe v. Board of Bar Examiners*, 353 U.S. 232, 239, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *see also id.* at 248 (Frankfurter, J., concurring). Each state has latitude to determine the most appropriate means of governing its lawyers, to permit the most efficient and effective use of its resources. California has chosen to govern its now approximately 122,000 lawyers through a state agency, whose governing board includes nonlawyers appointed by senior state officials. Its operations are regulated specifically by constitutional and statutory provisions, as well as by direct legislative oversight. These factors, among others, in the view of the California Supreme Court, demonstrate that the State Bar is not a private entity, but governmental in nature, bound by First Amendment restrictions on government speech. That decision is binding. *Lathrop, supra*, 367 U.S. at 828 (Wis-

---

<sup>10</sup>In so doing, petitioners also abandoned any challenge to the state law ruling that the State Bar is a California governmental entity and subject to the restrictions and protections adhering to such entities under California law. *See Stanson v. Mott, supra*, 17 Cal. 3d 206.



consin Supreme Court's interpretation of its integration order is binding).

An analysis of the constitutionality of the policy choices made by California in regulating the legal profession involves an examination of the nature and purpose of the state policy, and of the State Bar. This initial analysis is a matter of state law. *Standard Oil of Calif. v. Johnson*, 316 U.S. 481, 483, 86 L. Ed. 1611, 62 S. Ct. 1168 (1942). See also *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 339 & n.6, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1986) (deferring to Puerto Rico's construction of law affecting speech).

Furthermore, there is no need for a federal rule mandating uniform treatment of all state bars. States should be free to make policy choices on how to regulate the legal profession in response to their diverse circumstances, as they are free to formulate other legal relationships. See P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* at 533 (3d ed. 1988). Treatment of state bars should be responsive to and reflective of this diversity.<sup>11</sup>

<sup>11</sup>Labor law is highly federalized by the National Labor Relations Act and its amendments in the Labor Management Relations Act, 29 U.S.C. §§ 141, et seq., as well as by the Railway Labor Act, 45 U.S.C. 151, et seq. State labor regulation is limited by broad principles of federal preemption, see, e.g., *Garner v. Teamsters Local 776*, 346 U.S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953). Thus, the states never have been free to develop their own concepts of unionism outside the long shadow of federal law. By contrast, Congress left the field of regulation of the practice of law entirely to the states.

### C. The State Bar's Public Purpose And Role In The State Governmental System Place Its Activities Squarely Within Government Speech Doctrine

The State Bar possesses both the essential functional and structural attributes of a governmental agency. It is constrained by the public interest, which is enforced through the democratic process. The existence of this constraint and its attendant enforcement mechanism justify the latitude the courts have given the government in exercising its powers of speech. See *Aboud v. Detroit Board of Educ.*, 431 U.S. 209, 259 n.13, 52 L. Ed. 261, 97 S. Ct. 1782 (1977) (Powell, J., concurring).

#### 1. The Test For Government Speech Is Rational Relationship To A Legitimate Governmental End

Government must speak in order to govern. Therefore it may use tax revenue for speech activities rationally related to a legitimate governmental objective. See *Regan v. Tazation with Representation of Washington*, 461 U.S. 540, 547-48, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983). Labeling the objective as "political or ideological" does not alter this analysis. See *American Party of Texas v. White*, 415 U.S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) (rejecting equal protection challenge based on speech and association to Texas legislature's reimbursement of two major political parties' primary expenses); *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1983), *aff'd*, 461 U.S. 911, 77 L. Ed. 2d 280, 103 S. Ct. 1888 (1983) (upholding incumbent's franking privilege despite enhancement of incumbent's speech). Dissenters simply have no right to silence the government's affirmation of the values it was elected to promote. See L. Tribe, *American Constitutional Law* § 12-4 at 807 (1988).

Indeed, government speech is inherently political. The government must take substantive positions and decide disputed issues to govern. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), cert. denied, 460 U.S. 1023, 75 L.Ed.2d 495, 103 S.Ct. 1274 (1983) (state-sponsored television station may exercise editorial discretion which of necessity encompasses political issues). So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with the content of its message, for government is not required to be content-neutral. *Muir*, 688 F.2d at 1050 (Rubin, J., concurring).<sup>12</sup>

As this Court noted in *FCC v. League of Women Voters of California*, 468 U.S. 364, 385 n.16, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984), virtually every legislative appropriation will to some extent involve a use to which some taxpayers may object. "Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." *Id.* See also *Pacific Gas and Electric Co. v. California P.U.C.*, 475 U.S. 1, 24 n.3, 89 L.Ed.2d 1, 106 S.Ct. 903 (1986) (Marshall, J., concurring) (government subsidy of a preferred speaker causes no interference with anyone else's speech).

"[T]he reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people." *Abood*, *supra*, 431 U.S. at 259, n.13 (Powell, J., concurring).

<sup>12</sup> Examples of illegitimate governmental goals include censorship, *id.* at 1052, drowning out other speech, *Miller v. California Commission on the Status of Women*, 151 Cal. App. 3d 693, 198 Cal. Rptr. 877, appeal dismissed for want of jurisdiction, 469 U.S. 806, 83 L. Ed. 2d 15, 105 S. Ct. 64 (1984), and interference with the political process by government electioneering, *Stanson v. Mott*, 17 Cal. 3d 306, 130 Cal. Rptr. 697 (1976).

Dissenters who object to the way in which their taxes are spent have recourse within the democratic process. *Miller*, *supra*, 151 Cal. App. 3d at 701 n. 12, 702 (taxpayers who disagree with speech by state commission can attend its public meetings and use the electoral process to defeat legislators who appointed the commissioners and supported their positions).

Petitioners too have recourse to the democratic process to express their disagreement with the State Bar's positions. They can vote out of office those legislators who support the positions of the State Bar and approve of its activities and its funding. Because the Legislature not only controls the State Bar's ability to fund itself, but also contracts and expands the Bar's statutory powers, Petitioners have recourse to their legislators to affect the State Bar's powers.<sup>13</sup> Finally, the structure of the State Bar itself permits Petitioners to take a direct hand in shaping policy through the addition of their voices to, rather than the silencing of, other members of the State Bar.<sup>14</sup> An individual lawyer may join a section or committee; seek to become a delegate to the Conference of

<sup>13</sup> Indeed, in 1984, objectors to the State Bar's practice of evaluating sitting justices obtained passage of Bus. & Prof. Code § 6031(b), which prohibits the State Bar from evaluating specific justices without prior legislative approval.

<sup>14</sup> There is another fundamental consideration involved: avoiding content-based regulation. Petitioners violate this principle in their attempt to prevent speech by the State Bar. The decisions of this Court in both *Pacific Gas & Electric* and *League of Women Voters* clearly relied on this principle to forbid any restriction on speech, even government-supported speech, that looked to the content of the speech to determine the protection to which it was entitled. *Pacific Gas & Electric*, *supra*, 475 U.S. at 12-15; *League of Women Voters*, *supra*, 468 U.S. at 383-84. This principle thus prohibits the kind of analysis, based on content, that Petitioners seek to impose.

Delegates, support or oppose, orally or in writing, legislative positions proposed by the Committee on Legislation before their adoption; attend and speak at the Board of Governors meetings, or file written comments; vote for Board of Governors members not appointed by State authorities; become a candidate for election to the Board of Governors; and support or oppose Board legislative positions at the Legislature. See Declarations of Mary Wailes, Joint Appendix at 460-76.

## 2. The Source of the Funds Does Not Change the Result

It is the use of the funds for legitimate governmental purposes, not the method of collection or the breadth of the tax base, that is the criterion. Although Petitioners argue that only general tax revenues may be spent for government speech (Petitioners' Brief at 22-23), government may impose special taxes on limited groups to govern, within the limits of the democratic process. See *United States v. Lee*, 455 U.S. 252, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) (rejecting First Amendment challenge to payment of social security tax based on employer's religious objection to use of revenues); *Keller*, *supra*, 47 Cal. 3d at 1163 & n.8 (reclamation districts, water districts and school districts are governmental and have power to tax); *Erzinger v. Regents of the University of California*, 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982), *cert. denied*, 462 U.S. 1133, 77 L. Ed. 2d 1368, 103 S. Ct. 3114 (1983) (rejecting First Amendment challenge to use of mandatory student fees for abortion services).<sup>10</sup>

<sup>10</sup>Petitioners cite *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), as support for the proposition that the State Bar is not governed by the government speech doctrine. However, there are fundamental distinctions between the entities at issue. *Frame* in-

The logic permitting such directed taxation is straightforward. If, for example, the Legislature placed a tax on lawyers for general revenues and supported the Bar's functions from general revenues, no argument could be made that the activities were improperly funded. See, e.g., 16 U.S.C. § 460l-6a (national parks admission and special recreation use fees); California Bus. & Prof. Code § 16100 (collection by counties of license fees from businesses). What the Legislature has done here is identical in substance, and should be equally valid. See *Lathrop*, 367 U.S. at 864-65 (Harlan, J., concurring) ("a state legislature could certainly appoint a commission to make recommendations to it on the desirability of passing or modifying any of the countless uniform laws . . . . It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer, doctor, dentist, etc."). See also *Royall v. Virginia*, 116 U.S. 572, 580, 29 L. Ed. 735, 6 S. Ct. 510 (1886) ("The granting of a license,

involved a challenge to a promotional self-help program to reverse the decline of the beef industry, which was funded by assessments on beef producers to advertise beef. Noting that the issue was a "close one," the court declined to hold that the challenged advertising was government speech, basing its holding on two grounds. First, as the speech was not identified as governmental, the beef producers themselves, not the government, were strongly identified as the speakers. Second, the purpose of the program was self-help for the industry, and was . . . as functionally more akin to a union than a unit of government concerned with the public interest. Neither circumstance is presented by this case; far from being a close case like *Frame*, this case falls well within established government speech doctrine.

Further, the court upheld the challenged program in *Frame* despite its finding that government speech was not involved, because it found that the program served a compelling governmental interest — that of the survival of the beef industry. Surely the improvement of the administration of justice is compelling under this standard.



therefore, must be regarded as nothing more than a mere form of imposing a tax").

### 3. The State Bar's Speech Is Rationally Related To A Legitimate Governmental End

The State Bar's goal in engaging in all of the speech activities challenged by petitioners is the same: to fulfill its mandated responsibilities, including improving the administration of justice. This Court already has ruled that this goal is a legitimate one. *Lathrop, supra*, 367 U.S. at 843. Nothing in the record supports a finding to the contrary.

The means chosen by the State Bar — the filing of *amicus* briefs, lobbying the legislature, and holding the annual Conference of Delegates — are rationally related to this goal. Indeed, these activities directly serve the State Bar's mandate to improve the legal system.

#### a. Amicus Briefs Are Properly Within The State Bar's Province

Communicating with the courts on issues of concern to the legal community plainly promotes the State Bar's mandate to aid in the administration of justice, as well as informing the courts on matters pertaining to lawyers' activities and obligations, and to fair enforcement of the law. The filing of *amicus* briefs is the most effective, and indeed the only way in which the State Bar readily can carry on this dialogue. As California's mandated representative of the legal community, the State Bar has an important role to play as a friend of the court. *See Young Americans For Freedom v. Gorton*, 91 Wash. 2d 204, 588 P.2d 195 (Wash. 1978) (government has legitimate interest in informing court through *amicus* brief of state policy in favor of affirmative action).

This analysis holds true for the two briefs challenged by petitioners. The State Bar, as *amicus* in both cases, sought to inform the courts on matters in which it had historical involvement pursuant to its role in State government. The State Bar's *amicus* brief in the Victim's Bill of Rights case, *Brosnahan v. Brown*, discussed the effect of that ballot proposition on Evidence Code provisions drafted jointly by the State Bar and the Law Revision Commission. *See* Declaration of Truitt A. Richey, Joint Appendix at 447. The State Bar's *amicus* brief in the prison case, *Touissaint v. Yokey*, informed the courts of the results of thirty years of studies and recommendations made by the State Bar concerning the prison system. *See id.* at 449. Communication with the courts on statutes it has drafted and conditions it has studied is directly related to the improvement of the administration of justice, and is a role for which the State Bar is uniquely suited, as is evidenced by the fact that several *amicus* briefs were filed by the State Bar at the courts' request. *See* Joint Appendix at 447-50.

Petitioners may indeed hold a different conception of the scope of the law in these areas than does the majority of the State Bar. But some attorneys also disagree with the ethical standards formulated for their professional conduct, some of which cut very deeply into the personal standards and beliefs of the members. *See, e.g.,* California Rule of Professional Conduct 3-320 (attorney must inform client of intimate personal relationship with attorney for another party). While Petitioners concede that formulation of ethical rules and their enforcement are germane to the State Bar's function and thus proper, there is no principled basis for distinguishing between the two activities either on the basis of their ideological content or on their relation to the State Bar's functions. Both activities directly serve important state interests.

### b. The State Bar's Lobbying Is Proper

Petitioners' challenge to the State Bar's lobbying activities is even less specific than their challenge to its *amicus* filings. They simply provide a selective list of issues on which the State Bar lobbied the Legislature and then summarily assert that "[n]one of these related to the operation of the court system, delivery of legal services, or improvement of the profession." Petitioners' Brief at 25. This assertion is incorrect. Legislation on child support directly relates to the operation of the family court system and the rules governing family relationships. Legislation establishing criminal penalties directly relates to the operation of the criminal court system. The issue of sex discrimination implicates not only the court system but also improvement of the legal profession. See *Hishon v. King & Spalding*, 467 U.S. 69, 81 L.Ed.2d 59, 104 S.Ct. 2229 (1984).

Furthermore, the State Bar's lobbying activities are justified by its purposes in improving the administration of justice and in regulating the legal profession. Lobbying to improve the family law system, the environmental protection laws, or to ensure fair criminal penalties goes to the heart of the legal system, as does lobbying for disciplinary rules or regulations to improve the delivery of legal services.

Individuals speak to the Legislature through the power of the vote and of the purse. The State Bar's dialogue with the Legislature is accomplished in a different manner. The Legislature speaks to the State Bar by imposing various tasks upon it and by controlling its funding; the State Bar in turn speaks to the Legislature through its lobbying for improvements to the laws. See *Lehane v. City and County of San Francisco*, 30 Cal. App. 3d 1051, 106 Cal. Rptr. 918 (1972), *appeal dismissed*, 410 U.S. 962, 35 L.Ed.2d 698, 93 S.Ct. 1445 (1973) (upholding power of

governmental entity to lobby the Legislature). If the State Bar cannot lobby the Legislature, then the Legislature is deprived of the benefits of skilled judgment in considering legislation. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781-82 & n.18, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978).

### c. The Conference Of Delegates' Speech Should Not Be Restrained

The Conference of Delegates is a yearly conference attended by representatives of various local and special interest bar associations at which topics of interest to the delegates and their constituents are discussed. Petitioners fail to reveal to this Court what the Conference is or why it exists. The Conference is a forum for the expression of members' views, from every locality and specialized interest, including those with which petitioners agree and those with which petitioners disagree.<sup>16</sup> Points of view divergent from the State Bar leadership are represented as members of the State Bar communicate with one another on topics of concern to them as members of the legal community. Finally, by encouraging communication among various bar groups, the Conference also serves a social function. This Court approved similar annual meetings and social events in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 447, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984), one of the union cases Petitioners urge this Court to apply here.

<sup>16</sup>The discussions at the Conference neither reflect nor necessarily result in State Bar policy, but are the views of the members on topics of interest to them, and sometimes policy recommendations to the Board of Governors. See Status of Resolutions set forth in Joint Appendix 382-409. Even so, they relate closely to the practice of law and improvement of the administration of justice. See, e.g., *id.* at 383 (confidentiality of grievance proceedings, pro bono legal services, lawyer referral services).

Petitioners seek to prohibit the speech of the delegates. Such a request directly violates the delegates' First Amendment rights. *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) (invalidating prohibition against utility bill inserts discussing controversial issues). It would chill the speech of State Bar members, infringing on both their right to speak and their right to hear the speech of other members. See *Bellotti, supra*, 435 U.S. at 782. That Petitioners find offensive the speech of their fellow lawyers does not justify such censorship. *Consolidated Edison, supra*, 447 U.S. at 541-42.

Thus, the State Bar's activities enhance the governmental process because they add to the total quantum of speech. See *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975) (government speech that increases flow of information enhances First Amendment values). In sum, the speech activities are proper under applicable First Amendment standards; as the analysis below shows, other First Amendment goals are also met.

#### D. No Protected Associational Rights Are Violated

##### 1. The Associational Rights At Stake Are Limited

Despite this Court's ruling in *Lathrop, supra*, Petitioners contend that the State Bar violates their right of association. (Petitioners' Brief at 23). However, California's integrated bar has only a limited impact on Petitioners' interest in freedom of association. The association is neither intimate nor primarily expressive. In the absence of either type of relationship between Petitioners and the State Bar, Petitioners' free association claim must fail. *City of Dallas v. Stanglin*, 490 U.S. —, 104 L. Ed. 2d 18, 26, 109 S. Ct. 1591 (1989).

##### a. No Intimate Association Is Implicated

This Court has held that it is the nature of the "compelled" association that determines the scope of protection granted. *Roberts v. United States Jaycees*, 468 U.S. 609, 620, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). In *Roberts*, the Court held that the Minnesota Jaycees organization could be required by state law to permit women to be members. Recognizing a spectrum of types of association ranging from intimate familial association to association in impersonal, large business organizations, the Court found that while choice concerning the former is constitutionally protected, forced association with entities or persons in larger organizations at the other end of the spectrum, such as the Jaycees, may not be protected. See also *Hishon, supra*, 467 U.S. 69 (right of partners of a law firm not to associate with a certain individual may take secondary position to other governmental and societal interests).

A high degree of selectivity and closeness characterizes protected intimate association. "Conversely, an association lacking these qualities — such as a large business enterprise — seems remote from the concerns giving rise to this constitutional protection." *Roberts, supra*, 468 U.S. at 620. Plainly, the latter description identifies a state bar of 122,000 lawyers, who are joined together by their common profession, and its concomitant public service obligations, but nothing more.

##### b. No Expressive Association Is Restrained

With respect to "expressive association," the integrated bar has a very limited effect on rights, and one that is more than balanced by the governmental interests at stake. Unlike *Roberts*, which concerned the "right to associate with others in pursuit of a wide variety of political,



social, economic, educational, religious and cultural ends," 468 U.S. at 622, this case concerns negative association rights. In *Roberts*, First Amendment rights were implicated because the Jaycees had chosen to join together, and the government sought to force them to include others. This Court found that such an antidiscrimination law did not impose "any serious burdens on the male members' freedom of expressive association." *Id.* at 626.

Here, however, Petitioners do not assert their own right to join with others for expressive purposes, nor has their ability to do so been impaired. This is not a case where individuals who have chosen to associate are being forced to recognize as members individuals they do not wish to include. Rather, Petitioners assert negative rights of expressive association — the right not to be personally associated with the expression of other lawyers in the State. The associational interests here thus differ markedly from those at stake in *Roberts* in numerous ways.

First, the State Bar is organized primarily to regulate the legal profession and to improve the administration of justice. The Bar has a wide range of programs to accomplish these goals; only a very few entail speech. See Joint Appendix at 77, 114. Although the Bar does engage in expressive activities to fulfill certain of its mandates, Petitioners are not compelled to associate in any way with the lawyers who choose to assist the State Bar in those expressive activities. Furthermore, the likelihood that Petitioners might be "associated," i.e., identified individually, with points of view expressed by the State Bar is small, and the degree of impact, if any, on their rights occasioned by such a connection is slight. See *infra* p. 28.

An individual lawyer is no more forced to be associated with any position taken by the State Bar than a bar owner

forced to pay a license fee to the department of alcoholic beverage control is supposed by his customers to be in agreement with the positions of that department. Nor is any lawyer more closely associated with the State Bar's views than is a university student whose fees are used in support of university activities. See *Erringer*, *supra*, 137 Cal.App.3d 389.<sup>17</sup> The lawyer, the student, and the bar owner must each pay a fee but none must make any other commitment to the group or its activities. As this Court held in *Lathrop*, *supra*, the impact on associational rights from belonging to an integrated bar, even one that engages in expressive activities, is very limited and does not preclude compulsory membership. 367 U.S. at 827-28.

## 2. The State Bar Does Not Compel Petitioners To Affirm Any Belief

Petitioners' payment of fees to the State Bar does not require them to affirm its speech. As Justice Harlan noted in *Lathrop*:

"What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to

<sup>17</sup>*Erringer* involved payment of general health fees to benefit all students, including health benefits such as abortion counseling to which some students objected. No associational rights were implicated. In contrast, in *Goode v. Associated Students of the University of Washington*, 541 P.2d 762, 86 Wash.2d 94 (1975) and *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982), cert. denied, 475 U.S. 1065, 89 L.Ed.2d 602, 106 S.Ct. 1375 (1986), students were required to support private organizations that were dedicated to purely expressive purposes. The fees were unrelated to the purposes for which the state universities levied student fees, while imposing a more direct link to objectionable expressive activity, and were accordingly held unconstitutional.

promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance." 367 U.S. at 858 (Harlan, J., concurring).

While the First Amendment precludes the government from forcing individuals to affirm a certain belief, that affirmance must be direct in order to prevent the government from speaking; the statement must be either closely linked to the individual, or force the individual to speak in order to disassociate himself from that position. Thus, government cannot force an individual to recite the pledge of allegiance and salute the flag, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), nor can it force the individual to carry a slogan attached to his personal property by printing it on his automobile license plates, *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977). Government expression of a point of view using taxpayer money, however, is not forbidden by these cases. *League of Women Voters, supra*, 468 U.S. at 385 n.16.

This case is at the other end of the spectrum from *Barnette* and *Wooley*. There is no direct association between any member of the State Bar and any public position taken by the Bar that rises to the level of personal affirmance disapproved in *Barnette*, nor is there a physical and constant proximity of expression similar to that forbidden in *Wooley*.<sup>18</sup>

<sup>18</sup>In *Pacific Gas and Electric Co., supra*, 475 U.S. 1, this Court confirmed the importance of proximity. The Court refused to require

### E. The Different Purposes of Integrated Bars and Labor Unions Mandate Different Constitutional Treatment

The purposes for which integrated bars and labor unions are formed are fundamentally different, as are the reasons for permitting compelled membership or financial support of each. A labor union is a private organization created to serve the private, economic interests of its members; an integrated bar is created to serve the public interest by regulating its lawyers and educating, informing and assisting the public in areas where it has special knowledge, skills, and responsibilities.

The compulsion involved in a union or agency shop does serve a limited purpose beyond economics, in that it promotes labor peace by avoiding free riders who would benefit from collective bargaining. That interest, in preventing nonmembers from profiting from the union's representation of the bargaining unit as a whole without payment for that benefit, is financial as well. *See, e.g., NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41, 10 L. Ed. 2d 670, 83 S. Ct. 1453 (1963). Thus, the essence of compulsory membership or funding of a labor union is to serve a collective bargaining function. *See National Labor Relations Act* § 2(5), 29 U.S.C. § 152(5) (defining labor

a utility to include within its mailing envelope material prepared by a group opposing the utility's point of view, reasoning that the physical proximity of that opposing statement could require the utility to speak to disassociate itself from the view being expressed, even though the utility might otherwise have chosen to exercise its right not to speak on that issue. 475 U.S. at 16. Like the owner of the car in *Wooley*, the utility could not be forced to use its own property to carry the message with which it disagreed. *Id.* at 17. Here, there is no proximity between the message put forward by the Bar and any individual; the difference in degree remains a difference in substance.

organization as existing for purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

In contrast, the purposes of an integrated bar and the mandatory fees it receives are quite different. A bar does not regulate employer-employee relations, or serve as a collective bargaining agent. Instead, it may regulate lawyers, assist in the administration of justice, and counsel and aid other state agencies.

In *Lathrop, supra*, the Court approved the purpose of the integrated bar as "improving the quality of the legal service available" and "raising the quality of professional services." 367 U.S. at 843. The purposes of the Wisconsin bar, for which compulsory membership was approved, specifically included improving the administration of justice and providing a forum for discussion of "subjects pertaining to the practice of law, the science of jurisprudence, and law reform," all to discharge the public responsibilities of the profession. 367 U.S. at 828-29. The goals of the Wisconsin and California bars are essentially identical. Like California, Wisconsin viewed lobbying and the support of sections and committees as a means to achieve those goals. 367 U.S. at 829 n.7, 834-42.

The integrated bar is the vehicle through which lawyers fulfill their obligations to the courts and the public. Unlike many voluntary bar associations, formed to serve the special interests of their members, integrated bars must serve the public interest. That lawyers have special obligations to the public is an undisputed tenet of the profession, made necessary by the needs of the justice system to ensure fair and even-handed application of the laws. These special duties are also an outgrowth of special privileges and expertise not shared by other groups in

society. See *Mallard v. United States District Court*, 490 U.S. \_\_\_, 104 L. Ed. 2d 318, 332, 109 S. Ct. 1814 (1989). The bar has a responsibility to the public that is unique and different in degree from that expected of the members of other professions.

"This body of our citizenry known to the laws of this state as 'attorneys and counselors at law' form an integral and indispensable unit in our system of administering justice . . . . Thus it is that the profession and practice of the law, while in a limited sense a matter of private choice and concern in so far as it relates to its emoluments, is essentially and more largely a matter of public interest and concern . . . ." *State Bar of California v. Superior Court, supra*, 207 Cal. at 330-31.

The State Bar of California "is not analogous to a labor union;" its functions include "promoting the improved administration of justice." *Keller, supra*, 47 Cal. 3d at 1166 n.12.

Fundamental differences between integrated bars and private economic organizations like labor unions require an analysis that recognizes those distinctions in evaluating their activities. To restrict bars to what is justified by collective bargaining is error:

"The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same." *Pacific Gas & Elec. v. California P.U.C., supra*, 475 U.S. at 35 (Rehnquist, J., dissenting).



## II.

## UNDER THE ABOOD PRINCIPLES, THE CHALLENGED ACTIVITIES ARE PROPER

Petitioners seek to impose a different analysis of First Amendment rights, and to limit the State Bar by rules developed in the labor union context. Even were those cases applicable, however, the challenged activities would still be permissible.

### A. The Union Cases Permit Activities Germane To The Organization's Purpose

*Abood* and its progeny found certain union speech activities violated the First Amendment rights of dissenters not because the dissenters were associated with the union which espoused such positions, but because the dues of the dissenters were used to promulgate them. *Abood*, *supra*, 431 U.S. at 235-36. In reviewing expenditures of compulsory dues, *Abood* looked first to the purpose which justified compulsory membership or support. This important function — collective bargaining — in that case gave rise to the *Abood* formulation forbidding expenditures for “political and ideological purposes not germane to its duties as collective bargaining representative.” 431 U.S. at 232, 234.

Thus, if the challenged activity is relevant to the accepted purposes of the organization, the organization may use the compelled funds, even over dissent. What is precluded is the expenditure of compulsory dues for activities outside the functions that justify the compulsory membership or support, not merely activities with which petitioners disagree.

Germaneness to the purpose for which the organization exists is the standard, not “political” or “ideological” activity, as Petitioners insist. *Ellis*, *supra*, 466 U.S. at 456

(at a minimum, the union can spend dues “in support of activities germane to collective bargaining”)<sup>19</sup>. If such expenditures involve additional interference with dissenters’ First Amendment interests, they must be justified with respect to the governmental interest in the union shop. *Id.*<sup>20</sup>

Thus, proper application of the *Abood-Ellis* test here would require a two-step analysis: first, to determine the cause that justifies bringing together the lawyers who

<sup>19</sup>*Ellis* also clarifies that the label “political,” a point of contention among the various opinions in *Abood*, is not the test for whether an expenditure is permissible or not. *See Abood*, 431 U.S. at 243 (Rehnquist, J., concurring) (“the positions taken by public employees’ unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word ‘political’ be taken in its normal meaning”); *id.* at 257 (Powell, J., concurring) (“Collective bargaining in the public sector is ‘political’ in any meaningful sense of the word.”). As *Ellis* puts it, “the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” 466 U.S. at 448.

<sup>20</sup>In applying this standard, the Court found that union conventions, publications and social activities imposed little additional impingement on First Amendment rights, and none that could not be justified by the governmental interest behind the union shop itself. *Id.* at 456.

Nothing in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986), modified this standard in any way. *Hudson* involved a challenge to procedures established by the union to rebate a portion of dues used for activities that the union conceded were not germane to its collective bargaining activities. Once a violation of the First Amendment is found, established law requires that procedural protections be narrowly tailored. This issue of procedural protections is not now, and never has been, tendered by Petitioners.

compose the State Bar; and second, to decide whether the challenged activity is germane to that purpose, and if so, to balance its contribution to that purpose against any potential interference with First Amendment interests.

**B. The State Bar Is Not Required To Justify Its Activities By A Compelling State Interest**

Payment of union dues may be compelled despite political activity by the union. *Abood, supra*, 431 U.S. at 235. Any interference with First Amendment rights that arises from the fact of compulsory membership "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. *See also Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 233, 100 L.Ed. 1112, 76 S.Ct. 714 (1956). (Congress' judgment that union shop would promote labor peace was "an allowable one"). This Court has never required a union to justify its existence by proving it serves a compelling governmental interest, but only one that ranges from "legitimate" to "important." *See Hudson, supra*, 475 U.S. at 302-03 (governmental interest in labor peace is strong enough to support an agency shop).

Petitioners argue that a compelling state interest standard is applicable to California's integrated bar, although this standard was rejected in the union cases that they cite. This argument is foreclosed by *Lathrop*. *Lathrop's* determination that compulsory membership in the Wisconsin Bar did not unconstitutionally impair members' First Amendment rights has not been challenged, and remains compelling authority. *See* 367 U.S. at 843; *see also Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 L. Ed. 2d 157, 110 S. Ct. 204 (1989). Thus, to the extent petitioners urge that compulsory membership in and financial support of the State Bar

is unconstitutional because they view certain State Bar activities as unsupported by a "compelling" state interest, their argument is belied by the very cases on which they rely.

**C. The Challenged Activities Are Germane And Their Importance Outweighs Any Collateral Effect On First Amendment Rights**

**1. The Administration Of Justice Is An Appropriate Standard For Measuring State Bar Activities**

Petitioners' distinction between regulatory activities, which they concede are proper for an integrated bar, and administration of justice activities, which they oppose, rests on the assumption that activities to improve the administration of justice do not justify an integrated bar. The contrary is true; administration of justice functions have been the primary reason for integrating State bars.

"The administration of justice is the concern of the whole community, but it is the special concern of the bar. We are the ministers of justice, and no lawyer is worthy of any reputation in the profession, whatever his ability may be, if he does not regard himself first and last as a minister of justice in the community in which he practices.

"This Conference has believed and has recorded its belief for many years that progress could be made through an organization in each state of the bar of the state which would be all-inclusive and which

would bring all lawyers into a sense of their obligations and with a higher opportunity to exercise their privileges through membership in a state organized bar." 1 State Bar J. 3, 3-4 (1926) (*Reprinting* speech by the Hon. Charles Evans Hughes to Conference of Bar Delegates of American Bar Association).

The integrated bar, from its earliest days, has been the means "to bring home to the individual lawyer his responsibility to the profession and to provide him with power to discharge his duty." 2 Journal of the American Judicature Society 105, 106, "Redeeming a Profession" (1918).<sup>21</sup>

To accomplish these goals, authorizing legislation and constitutional provisions define a cohesive sphere limiting the State Bar's activities. As the California Supreme Court observed, the Bar's function

"is not limited to promoting the self-interest of its members, but extends to promoting the improved administration of justice. Thus the bar is properly concerned with legislation other than just that which

<sup>21</sup>The American Judicature Society, one of the first advocates of the integrated bar, stated:

"... The range of activities of the [integrated bar] will not stop with the matter of admission and discipline, which are largely domestic policing; they will be constructive in ways now hardly dreamed of. There will be many opportunities for developing increased usefulness to all its members and the the public....

"Such an integrated bar would naturally, and with the greatest resources, address itself to the task of advising courts and legislatures with respect to simplifying procedure. It would form just such a sustaining body as our courts need and this alone would be reason enough in many states for its existence...." *Id.* at 109-10.

affects the earnings and working conditions of attorneys." 47 Cal. 3d at 1166 n.12.

Lawyers serve this function because "there are areas in which 'lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.'" *Lathrop, supra*, 367 U.S. at 863 (Harlan, J., concurring).

The State Bar acts collectively in areas broadly classified as regulation of the profession and improvement of the administration of justice. Petitioners concede that regulation of the profession includes admission to practice, disciplinary activities, and formulation of ethical standards. This area also includes enforcement of attorneys' obligations to deliver legal services. *See Mallard, supra*, 104 L. Ed. 2d at 332 (recognizing lawyer's ethical obligations to volunteer time to ensure the delivery of legal services).

In addition to ensuring access to the courts, administration of justice extends to informing the legislature in areas of the Bar's expertise through law revision commissions, judicial councils, and lobbying. It includes assisting the judiciary and the public, through service on commissions on judicial performance, evaluation of potential judges, the filing of *amicus* briefs, and assisting in continuing legal education and other client protection measures. *See Keller, supra*, 47 Cal.3d at 1169.

Activities in all the approved areas serve the public interest by ensuring access to the courts and adequate representation, as well as improving the quality of the laws and the fairness and consistency of their enforcement. Petitioners respond to the detailed authorization of the State Bar's activities with categorical attacks on all lobbying, all *amicus* briefs, and all activities of the Conference of Delegates. They do not seek to examine any



specific action to determine if it serves the administration of justice. Given the importance of that organizing principle, however, such a conceptual attack is not sufficient to invalidate the State Bar's administration of justice activities.<sup>22</sup> Rather, because the concept of administration of justice is an appropriate basis for the requirement of compulsory membership, it properly serves as the measure of the germaneness of the challenged activities.

## 2. The Challenged Activities Are Germane To The Authorized Purposes Of The State Bar

Petitioners' brief on the merits addresses three challenged groups of activities. First, Petitioners attack the State Bar's filing of *amicus* briefs, both in general and in two specific instances: one brief questioning the constitutionality of an initiative passed by the public known popularly as the Victim's Bill of Rights, the second supporting a challenge to the constitutionality of prison conditions in California. Petitioners next attack the entirety of the subjects on which the State Bar has lobbied the Legislature, even those related to admission and discipline, which Petitioners concede are germane. Fi-

---

<sup>22</sup>This Court found administration of justice functions similar to those performed by the State Bar sufficiently weighty to reject the First Amendment challenge presented to the constitutionality of the Wisconsin integrated bar in *Lathrop*, *supra*, 367 U.S. at 843. *See also* *Levine v. Heffernan*, *supra*, 864 F.2d 457. Thus, as in Wisconsin the purpose of the compulsory membership is not limited to regulation of practice, but includes the other activities mandated by the Legislature to improve the administration of justice. *Lathrop*, 367 U.S. at 843; *see also* *Hollar v. Government of the Virgin Islands*, 857 F.2d 163, 169 (3d Cir. 1988); *Sams v. Olak*, 225 Ga. 497, 169 S.E.2d 790 (1969), *cert. denied*, 397 U.S. 914, 25 L.Ed.2d 94, 90 S.Ct. 916 (1970).

nally, Petitioners attack the annual meetings of the Conference of Delegates.<sup>23</sup>

These three activities are unquestionably germane to the State Bar's purpose: they represent the means by which the State Bar communicates with the courts, the Legislature, and its members in fulfilling its obligation to improve the legal system. Their importance is sufficient to justify any collateral burden placed on Petitioners beyond that caused by compulsory membership itself. *See supra* pp. 20-24.

Through each of these activities the State Bar communicates with other governmental entities and the public. For example, the State Bar lobbies to inform the Legislature of relevant facts and law on issues as to which it has special knowledge or expertise. Petitioners seek to avoid the required reasoned analysis of the State interests at stake by using the sometimes pejorative label "lobbying" as a replacement for the facts. A fair analysis of the facts also demonstrates that the State Bar's *amicus* program serves the courts' needs for information on important legal issues. The courts themselves have asked the State Bar to file *amicus* briefs to supplement the information they receive from the parties. *See Joint Appendix* at 447-50.

---

<sup>23</sup>Petitioners' failure to state specific objections is one of a series of reasons that this case may not present the best vehicle for deciding the rules to be applied to integrated bars. The resolution of the only specific activity objected to — the 1982 judicial retention campaign — leaves a factual record created solely by summary judgment motions, and containing only categorical objections to types of activities rather than specified actions. In addition, as set forth above, the State Bar's structure as a governmental agency differs in important respects from other state bars. On this record, petitioners seek to *enjoin speech*, not simply recover a portion of the fees paid, despite this Court's refusal to permit such relief in the union cases.

Finally, the State Bar holds its Conference of Delegates to ensure a forum for lawyers to discuss issues of importance to the legal community. *Ellis* upheld use of compulsory union dues to fund conventions at which union officials were elected, despite the fact that various politicians attended and addressed the conventions. *Ellis*, *supra*, 466 U.S. at 447 and 449 (Powell, J., concurring in part and dissenting in part). The State Bar submits that the purpose activating the Conference of Delegates is broader and the intrusion narrower than in *Ellis*; thus the Conference of Delegates passes constitutional muster.

### 3. The State Interest Outweighs Any Impingement On Dissenters' First Amendment Interests

Petitioners, as lawyers in California, are mandated to pay annual fees to the State Bar, but need do nothing else. *Keller*, 47 Cal. 3d at 1157. Although Petitioners allege that their First Amendment rights are infringed by the State Bar's use of their fees to take positions with which they disagree, the actual impact on Petitioners from this activity is minimal. Balanced against the strength of the interest served by the State Bar's activities, this minimal infringement does not rise to the level of a constitutional violation.

Little additional impingement on Petitioners' speech rights is created by the challenged activities, as Petitioners' membership in the Bar is statutorily mandated, and comes about only as a result of their chosen profession. Thus, Petitioners are not branded with the views of the State Bar as their own. *See Wooley, supra, Barnette, supra*. Because they are not likely to be identified with the speech of the State Bar simply because they are among California's 122,000 lawyers, Petitioners are not forced to speak in order to disassociate themselves with that

speech. Moreover, they are free to disavow the State Bar's positions. Under these circumstances, the First Amendment infringement is minimal. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980). Furthermore, any impingement that might be found is more than justified by the large contribution these activities make towards fulfilling the State Bar's obligation to aid in the continued improvement of the legal system.

The fact that Petitioners are required to subsidize speech with which they may disagree does not, standing alone, alter the balance. As this Court noted in *Abood*, an employee may have ideological objections to many activities undertaken by a union in its role as exclusive representative. The interference with First Amendment rights that results from such activities, however, does not invalidate them. 431 U.S. at 222-23. The question is where to draw the line between the needs underlying the creation of the group and the rights of the individual. The germaneness test accomplishes this line-drawing for labor unions, balancing the needs of the group against the rights of the individual. If these rules were applicable to the State Bar, the line would properly be drawn between laws and political campaigning. *See pp. 44-45, infra*.

In sum, the challenged methods for lawyers to communicate with each other, the courts, the legislature and the public have been in force for 60 years precisely because they serve the interests the State Bar was created to serve. The State Bar's performance of these duties, and the support of this activity by all the lawyers in the State, help discharge the special responsibilities that attach to all members of the legal profession. This public interest in the progress of the rule of law, not mere economic self-interest or labor peace, is the scope of representation of



the State Bar. See *Herron, supra*, 212 Cal.196. Given the public interest inherent in the practice of law, lawyers cannot simply opt out of their support for certain authorized activities of the State Bar by defining the public interest in their profession as narrowly as possible, any more than union members can opt out of paying for their fair share of maintaining labor peace.

#### D. The Strict Scrutiny Standard of Review Does Not Alter The Result

##### 1. Strict Scrutiny Does Not Apply To The State Bar's Activities

As set forth at p. 34, *supra*, this Court refused to apply strict scrutiny to union activities. Nevertheless, Petitioners urge that it be applied to the State Bar. Strict scrutiny requires a close review of the fit between the means (compulsory membership and fees) and the ends (performance of a legislatively mandated function) to ensure that it is "carefully tailored." *Roberts, supra*, 468 U.S. at 623. This review entails a search for less restrictive alternatives. *Id.* However, Petitioners have never offered any alternative means for achieving the State Bar's goals; they wish simply to abolish all of the legislatively determined functions outside of the area that they call regulation of practice. This suggests that no more narrowly tailored means exist.

Some *amici* supporting Petitioners have suggested dividing Bar activities between those funded by mandatory dues and those funded by voluntary dues. This alternative does not provide a workable, predictable line that would permit the State Bar to function. See *Keller*, 47 Cal. 3d at 1165-66.

For example, the Legislature requires the Bar to assist the Law Revision Commission in studying and recom-

mending improvements to the laws. Gov't Code § 8287. If only voluntary dues may be used for Law Revision Commission assistance, the ability to comply with the Legislature's commands becomes contingent on the interest of lawyers in financially assisting governmental functions.<sup>24</sup> Requiring such funding to be voluntary would impair the Bar's ability to comply with the mandated function, and thus the Legislature's ability to command it to be done. Such an interference with the operation of state government is not supported by any authority and runs counter to the basic principles of federalism.

First Amendment law does not limit compelled contributions to the study and improvement of laws by governmentally composed commissions. *Lathrop*, 367 U.S. at 864-65 (Harlan, J., concurring). Cf. *FCC v. League of Women Voters, supra*, 468 U.S. at 385 n.16. What Petitioners seek is a federal judicial intrusion into constitutionally permissible state legislative choices.<sup>25</sup> See *Lathrop, supra*, 367 U.S. at 850 (Harlan, J., concurring) ("I do not understand why it should become unconstitutional for the

<sup>24</sup>Rational economic actors could well prefer lower bar dues to participating in funding State Bar programs, even if they had no philosophical disagreement with the purpose of the spending. Voluntary taxation is not an effective method of raising revenue.

<sup>25</sup>The examples could be multiplied. Pursuant to Government Code § 68725, the State Bar must assist the Commission on Judicial Performance. Government Code § 12011.5 requires the State Bar to evaluate the qualifications of and make recommendations to the governor concerning potential appointees or nominees for judicial office. Obviously, performance of such functions inherently breeds controversy. Nonetheless, their importance cannot be denied. The State Bar could not effectively carry out these activities if it had to take referenda on each task referred to it under these statutes and then cut its budget to fit the views of dissenters.



State Bar to use appellant's dues to fulfill some of the very purposes for which it was established").

A less radical alternative than that suggested by Petitioners might be to decide permissible expenditures on a case-by-case basis. However, this approach presents numerous problems, including lack of predictability, and would chill the State Bar's speech. Given the State Bar's statutory and constitutional mandate, and the fact that the legal system permeates the fabric of our society, it is not possible to draw bright lines delineating what legal issues are and are not the State Bar's business. As the court below noted, "Laws are the business of lawyers." *Keller*, 47 Cal. 3d at 1169.<sup>26</sup>

There is, however, a clear line that can be and has been drawn. It was drawn by the California Supreme Court in *Stanson v. Mott*, *supra*, 17 Cal. 3d 206, and again in its opinion below. Under these cases, the State Bar cannot use dissenters' dues for partisan electoral purposes. The State Bar may not campaign for politicians or specific

<sup>26</sup>The unpredictability and confusion resulting from application of such a standard is starkly illustrated by the different results obtained by the two appellate courts that have applied it. In *Gibson v. the Florida Bar*, 798 F.2d 1564 (11th Cir. 1986) the court limited the permissible sphere of activities funded by compulsory dues to those pertaining to the role of the lawyer in the judicial system and society, such as regulation of attorneys, budget appropriations for judiciary and legal aid, proposed changes in litigation procedures, regulation of client trust accounts and admission standards. 798 F.2d at 1569 & n.4. In *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988), the court took a broader view of permissible activities as those related to "the promotion of a just legal system," *id.* at 169, which encompassed a statement concerning the settlement of a labor dispute and social activities. *Id.* at 170. Starting from the same test, these two courts achieved strikingly different results.

judges or ballot initiatives using compulsory dues. This is a stable, predictable and philosophically justifiable line.<sup>27</sup>

## 2. The State Bar's Activities Survive Strict Scrutiny

Even if a strict scrutiny standard of review were applicable here, the State Bar's activities would be constitutionally permissible. The public service function justifying the State Bar's activities is undoubtedly a compelling state interest. *Lathrop*, *supra*, 367 U.S. at 848 (Harlan, J., concurring); *Mallard*, *supra*, 104 L. Ed. 2d at 332 (Kennedy, J., concurring) (lawyers have obligations by virtue of their special status as officers of the court). Indeed, the majority of courts to consider the constitutionality of state bar expenditures have found this interest to be compelling. *Gibson*, *supra*, 798 F.2d at 1568 ("the Bar's capacity and responsibility to advise and educate gives rise to a compelling governmental interest distinct from that of the labor union"); *Falk v. State Bar of Michigan*, 418 Mich. 270, 342 N.W.2d 504, 513 (1981), *cert. denied*, 469 U.S. 925, 83 L.Ed.2d 253, 105 S.Ct. 315 (1985) (separate opinion of Boyle, J.) (legislature has "keen interest" in Bar's input); *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753, 757 (1986) ("crucial role"); *Hollar*, *supra* (upholding variety of bar activities).

Lobbying the Legislature on behalf of law reform, filing *amicus* briefs on various issues of legal moment, and sponsoring free and frank exchanges among lawyers of views on current legal issues all directly advance the State Bar's mandate of improving the administration of justice in California. Indeed, these are the State Bar's

<sup>27</sup>It should be noted that the event precipitating the *Gibson* lawsuit, the advocacy by the Florida Bar of a ballot proposition, *see* 798 F.2d at 1566, would be forbidden in advance by the *Stanson/Keller* standard, whereas the other challenged activities would not.

most effective tools for communicating and sharing its expertise with the Legislature, the executive branch, the courts and the public. *Keller*, 47 Cal. 3d at 1169 & n.20.

No less restrictive means are available to enable the State Bar to fully accomplish its essential functions. Because a labor union is legitimized by the state interest in labor peace, categories of expenditures such as lobbying and litigation (that do not concern its specific collective bargaining agreement) can be delineated in advance as outside its essential purpose, and dues prorated accordingly. *Ellis, supra*, 466 U.S. at 448-51. The State Bar's public service role, in contrast, precludes such a broad categorical approach to its spending. As noted above, viewed as general categories, lobbying and litigation are natural means to accomplish the State Bar's responsibilities to assist in improving the legal system.

Although the State Bar sets forth in its yearly budget to the Legislature the amounts to be spent for categories of activities such as lobbying and the filing of *amicus* briefs, the substantive content of these activities cannot be determined in advance. The State Bar simply cannot know at the outset of the year which cases will be taken by appellate courts and thus cannot identify in its budget the subjects of its intended *amicus* briefs. Similarly, the State Bar cannot know in advance the substance of bills affecting the legal system that will be brought up in the Legislature.<sup>28</sup>

<sup>28</sup>Thus, it is not possible to set up a *Hudson*-type escrow system in advance of the State Bar's spending. Indeed, a *Hudson* system breaks down entirely when applied to an activity such as the annual Conference of Delegates. It is known in advance that the yearly meeting will discuss topics of interest to the legal community. However, it is not possible to predict in advance what issues may be injected into the Conference by individual delegates, and it would be impossible to

Thus, any system requiring the determinations suggested by the labor cases will make it impossible for the State Bar to carry out its important governmental functions. *Keller*, 47 Cal. 3d at 1165-66. Existing law does not require this Court to curtail the operations of California government.

### CONCLUSION

The State Bar has posed two questions that lie at the heart of this case. The first, whether the integrated bar may serve both regulatory and administration of justice functions, was answered affirmatively almost thirty years ago by this Court in *Lathrop*. The circumstances presented by this case provide no reason to abandon that decision.

The second question, whether compelled fees may be used to advance both goals, should be answered affirmatively today. Because of the governmental nature of the State Bar of California, such mandated fees raise no different constitutional concerns than do other taxes. The activities supported by these fees directly serve important state interests. Therefore, Petitioners may not enjoin them.

Petitioners' arguments that the challenged activities are improper fail on two grounds. Each of the challenged activities is appropriate under the government speech doctrine. Even under the union analogy that Petitioners

---

require the Bar to attempt to calculate at the inception of each year the percentage of time that will be spent at the conference on noncontroversial issues and housekeeping matters, versus issues that may be raised by individual delegates with whom petitioners may disagree. *Cf. Ellis, supra*, 466 U.S. at 448 (union's annual meeting serves interest sufficient to outweigh any impingement on dissenter's First Amendment rights despite political speeches unrelated to collective bargaining).

urge this Court to apply, each of the activities meets the test actually established by the decisions of this Court.

By upholding the decision below, this Court will reaffirm both the importance of the public interest goals served by the State Bar, and the right of the states to organize and improve their legal systems as their circumstances require. The State Bar respectfully requests this Court to enable it to continue to fulfill its role in the governance of the State of California, by affirming the decision of the California Supreme Court.

DATED: December 18, 1989

Respectfully submitted,

HERBERT M. ROSENTHAL  
DIANE YU

555 Franklin Street  
San Francisco,  
California  
(415) 561-8200

HUFSTEDLER, MILLER, KAUS  
& BEARDSLEY

SETH M. HUFSTEDLER\*  
ROBERT S. THOMPSON  
LAURIE D. ZELON  
MARY E. HEALY  
JUDITH R. STARR

\*COUNSEL OF RECORD  
355 South Grand Avenue  
45th Floor  
Los Angeles, California  
(213) 617-7070

*Attorneys for Respondents*

# APPENDIX A California State Government Code

§ 12011.3. Judicial Branch. State Bar of California.  
Added 1989.

(a) In the event of a vacancy in a position of the State Bar, the Governor shall appoint a person to fill the position until the Governor has appointed a permanent successor. The Governor is required to appoint a person to fill the position of the State Bar who shall be a member of the State Bar and shall be a resident of the State of California. The Governor shall not appoint a person who is a member of the State Bar who is a resident of the State of California who is a member of the State Bar who is a resident of the State of California.

(b) The State Bar shall have the right to appoint a person to fill the position of the State Bar who shall be a member of the State Bar and shall be a resident of the State of California. The Governor shall not appoint a person who is a member of the State Bar who is a resident of the State of California who is a member of the State Bar who is a resident of the State of California.

The Governor shall not appoint a person who is a member of the State Bar who is a resident of the State of California who is a member of the State Bar who is a resident of the State of California.



## APPENDIX A

### California State Government Code

#### § 12011.5. Judicial vacancies; state bar evaluation of candidates

(a) In the event of a vacancy in a judicial office to be filled by appointment of the Governor or in the event that a declaration of candidacy is not filed by a judge and the Governor is required under subdivision (d) of Section 16 of Article VI of the Constitution to nominate a candidate, the Governor shall first submit to a designated agency of the State Bar of California the names of all potential appointees or nominees for *the* judicial office for evaluation of their judicial qualifications.

(b) The membership of the designated agency of the State Bar responsible for evaluation of judicial candidates shall consist of attorney members and public members with the ratio of public members to attorney members determined, to the extent practical, by the ratio established in Section 6013, 6013.4, and 6013.5, inclusive, of the Business and Professions Code. It is the intent of this subdivision that the designated agency of the State Bar responsible for evaluation of judicial candidates shall be broadly representative of the ethnic, sexual, and racial diversity of the population of California and composed in accordance with Section 11140 and 11141 of the Government Code. The further intent of this subdivision is to establish a selection process for membership on the designated agency of the State Bar responsible for evaluation of judicial candidates under which no member of *that* agency shall provide inappropriate, multiple representation for purposes of this subdivision.

(c) Upon receipt from the Governor of the names of candidates for judicial office and their completed per-

sonal data questionnaires, the State Bar shall employ appropriate confidential procedures to evaluate and determine the qualifications of each candidate with regard to his or her ability to discharge the judicial duties of the office to which the appointment or nomination shall be made. Within 90 days of submission by the Governor of the name of a potential appointee for judicial office, the State Bar shall report in confidence to the Governor its recommendation whether the candidate is exceptionally well-qualified, well-qualified, qualified, or not qualified and the reasons therefor, and may report, in confidence, such other information as the State Bar deems pertinent to the qualifications of the candidate.

(d) In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience.

(e) The State Bar shall establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office by the designated agency. *These* rules and procedures shall establish appropriate, confidential methods for disclosing to the candidate the subject matter of substantial and credible adverse allegations received regarding the candidate's health, physical or mental condition, or moral turpitude which, unless rebutted, would be determinative of the candidate's unsuitability for judicial office. No provision of this section shall be construed as requiring that any rule or procedure be adopted which permits the disclosure to the candidate of information from which the candidate may infer the source, and no information shall either be disclosed to the candidate nor be obtainable by any process which would jeopardize the confidentiality of

communications from persons whose opinion has been sought on the candidate's qualifications.

(f) All communications, written, verbal or otherwise, of and to the Governor, the Governor's authorized agents or employees, including, but not limited to, the Governor's Legal Affairs Secretary and Appointments Secretary, or of and to the State Bar in furtherance of the purposes of this section are absolutely privileged from disclosure and confidential, and any communication made in the discretion of the Governor or the State Bar with a candidate or person providing information in furtherance of the purposes of this section shall not constitute a waiver of *the* privilege or a breach of confidentiality.

(g) When the Governor has appointed a person to a trial court who has been found not qualified by the designated agency, the State Bar may make public this fact after due notice to the appointee of its intention to do so, but no such notice or disclosure shall constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the appointee.

(h) When the Governor has nominated or appointed a person to the Supreme Court or court of appeal in accordance with subdivision (d) of Section 16 of Article VI of the State Constitution, the Commission on Judicial Appointments may invite, or the State Bar's governing board or its designated agency may submit to the commission its recommendation, and the reasons therefor, but no such disclosure shall constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the nominee or appointee.

(i) No person or entity shall be liable for any injury caused by any act or failure to act, be it negligent, intentional, discretionary, or otherwise, in the furtherance of the purposes of this section, including, but not limited to, providing or receiving any information, making any recommendations, and giving any reasons therefor. As used in this section, the term "State Bar" means its governing board and members thereof, the designated agency of the State Bar and members thereof, and employees and agents of the State Bar.

(j) At any time prior to the receipt of the report from the State Bar specified in subdivision (c) the Governor may withdraw the name of any person submitted to the State Bar for evaluation pursuant to this section.

(k) No candidate for judicial office may be appointed until the State Bar has reported to the Governor pursuant to this section, or until 90 days have elapsed after submission of the candidate's name to the State Bar, whichever occurs earlier. The requirement of this subdivision shall not apply to any vacancy in judicial office occurring within the 90 days preceding the expiration of the Governor's term of office, provided, however, that with respect to *those* vacancies and with respect to nominations pursuant to subdivision (d) of Section 16 of Article VI of the Constitution, the Governor shall be required to submit any candidate's name to the State Bar in order to provide it an opportunity, if time permits, to make an evaluation.

(l) Nothing in this section shall be construed as imposing an additional requirement for an appointment or nomination to judicial office, nor shall anything in this section be construed as adding any additional qualifications for the office of a judge.

(m) The Board of Governors of the State Bar shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in, any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature, except an evaluation, review, or report on potential judicial appointees or nominees as authorized by this section.

The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such an evaluation, review, or report in his or her individual capacity.

(n) If any provision of this section other than a provision relating to or providing for confidentiality or privilege from disclosure of any communication or matter, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this section to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this extent the provisions of this section are severable. If any other act of the Legislature conflicts with the provisions of this section, this section shall prevail.

(Amended by Stats.1984, c. 16, § 3.)

## § 6. Judicial Council

Sec. 6. The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges of superior courts, 3 judges of municipal courts, and 2 judges of justice courts,



each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house.

Council membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure.

To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.

The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

Judges shall report to the Judicial Council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned. -

(Added Nov. 8, 1966. Amended Nov. 5, 1974.)

## § 8. Commission on judicial performance

Sec. 8. The Commission on Judicial Performance consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are 4 years.

Commission membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

(Added Nov. 8, 1966. Amended Nov. 5, 1974; Nov. 2, 1976.)

## § 6026.5. Public meetings; exceptions

Every meeting of the board shall be open to the public except those meetings, or portions thereof, relating to:

(a) Consultation with counsel concerning pending or prospective litigation.

(b) Involuntary enrollment of active members as inactive members due to mental infirmity or illness or addiction to intoxicants or drugs.

(c) The qualifications of judicial appointees, nominees, or candidates.

(d) The appointment, employment or dismissal of an employee, consultant, or officer of the State Bar or to hear complaints or charges brought against such employee,

consultant, or officer unless such person requests a public hearing.

(e) Disciplinary investigations and proceedings, including resignations with disciplinary investigations or proceedings pending, and reinstatement proceedings.

(f) Appeals to the board from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate.

(g) Appointments to or removals from committees, boards, or other entities.

(h) Joint meetings with agencies provided in Article VI of the California Constitution.

(Added by Stats.1975, c. 874, p. 1953, § 7.5.)

§ 6086.8. Judgments for actions committed in a professional capacity; claims or actions for damages; reports to state bar

(a) Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

(b) Every claim or action for damages against a member of the State Bar of California for fraud, misrepresentation, breach of fiduciary duty, or \* \* \* negligence committed in a professional capacity shall be reported to the State Bar of California within 30 days of receipt by the admitted insurer or licensed surplus brokers providing

*professional liability insurance to that member of the State Bar.*

(c) An attorney who does not possess professional liability insurance shall send a complete written report to the State Bar as to any settlement, judgment, or arbitration award described in subdivision (b), in the manner specified in that subdivision.

(Added by Stats.1986, c. 475, § 3. Amended by Stats.1988, c. 1159, § 15.)

§ 20000. Short title

This part may be cited as the Public Employees' Retirement Law.

(Added by Stats.1945, c. 123, p. 573, § 1. Amended by Stats.1967, c. 84, p. 989, § 1; Stats.1967, c. 1631, p. 3899, § 1, operative July 1, 1968.)

§ 20009. Public agency in general

"Public agency" means any city, county, district, other local authority or public body of or within this State.

(Added by Stats.1945, c.123, p. 574, § 1.)

§ 20009.1. Public agency; scope

"Public agency" also includes the following:

(a) The Commandant, Veterans Home of California, with respect to employees of the post exchange and other post fund activities whose compensation is paid from the post fund of the Veterans Home of California.

(b) Any foundation or trust established for the purpose of providing essential activities related to, but not normally included as a part of, the regular instructional

program of the California State University \* \* \* or community college.

(c) Any student body or nonprofit organization composed exclusively of students of the California State University \* \* \* or community college or of members of the faculty of the California State University \* \* \* or community college, or both, and established for the purpose of providing essential activities related to, but not normally included as a part of, the regular instructional program of the California State University \* \* \* or community college.

(d) The Adjutant General with respect to persons employed by him or her pursuant to federal regulations and compensated directly from federal funds.

(e) A state organization of governing boards of school districts, the primary purpose of which is the advancing of public education through research and investigation.

(f) Any nonprofit corporation whose membership is confined to public agencies as defined in Section 20009.

(g) A section of the California Interscholastic Federation.

(h) Any credit union incorporated under Division 5 (commencing with Section 14000) of the Financial Code, or incorporated pursuant to federal law, with 95 percent of its membership limited to employees who are members of or retired members of the Public Employees' Retirement System or the State Teachers' Retirement System, and their immediate families, and employees of any such credit union. For the purposes of this subdivision, "immediate family" means those persons related by blood or marriage who reside in the household of a member of the credit union who is a member of or retired member of the Public Employees' Retirement System or the State

Teachers' Retirement System. The credit union shall pay any costs that are in addition to the normal charges required to enter into a contract with the board. All such payments made by the credit union which are in addition to the normal charges required shall be added to the total amount appropriated by the Budget Act for the administrative expense of the system. *For purposes of this subdivision, a credit union shall not be deemed to be a public agency unless it has entered into a contract with the board pursuant to Chapter 4 (commencing with Section 20450) of this part prior to January 1, 1988. After January 1, 1988, the board shall not enter into a contract with any credit union as a public agency.*

(i) Any county superintendent of schools which was a contracting agency on July 1, 1983, and any school district or community college district which was a contracting agency with respect to local policemen, as defined in Section 20020.8, on July 1, 1983.

(Amended by Stats.1982, c. 330, p. 1618, § 1.5, eff. June 30, 1982, operative July 1, 1983; Stats.1987, c. 562, § 1.)

#### Rule 3-320. Relationship With Other Party's Lawyer.

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

#### Discussion:

Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another member who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter.



## **PROOF OF SERVICE BY MAIL**

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 18, 1989, I served the within Respondents' Brief on the Merits in re: Eddie Keller v. State Bar of California in the United States Supreme Court October Term 1988 No. 88-1905, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Ronald A. Zumbrun  
John H. Findley  
Anthony T. Caso  
Counsel of Record  
Pacific Legal Foundation  
2700 Gateway Oaks Drive  
Suite 200  
Sacramento, California 95833

All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 18, 1989, at Los Angeles, California

CE CE Medina  
CE CE MEDINA

JAN 12 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
Supreme Court of the United States  
October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M.  
KINTER; DAVID LAMPE; GARRETT BEAUMONT;  
CHRISTOPHER L. FAIRCHILD; JOHN A. GORDNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.;  
J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D.  
PIEPER; THOMAS HUNTER RUSSELL; NANCY L.  
SWEET; MICHAEL J. WEINBERGER; DAVID E.  
WHITTINGTON; THOMAS R. YANGER; WARD A.  
CAMPBELL; DONALD C. MEANEY; ASSEMBLYMAN  
PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY  
VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO;  
GEORGE W. COUCH, III; BURKE M. CRITCHFIELD;  
THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH  
GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A.  
HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A.  
SILBERMAN; DANIEL J. TOBIN; JAMES D.  
WARD; and JOON HEE RHO,

*Respondents.*

On Writ Of Certiorari To The Supreme Court Of California

PETITIONERS' REPLY BRIEF

RONALD A. ZUMBRUN  
JOHN H. FINDLEY  
\*ANTHONY T. CASO  
\*Counsel of Record  
Pacific Legal Foundation  
2700 Gateway Oaks Drive,  
Suite 200  
Sacramento, California 95833  
Telephone: (916) 641-8888  
*Attorneys for Petitioners*



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED.....	ii
INTRODUCTION.....	1
ARGUMENT .....	3
I. MANDATORY MEMBERSHIP IN AND COM- PELLED DUES PAYMENTS TO THE STATE BAR IMPLICATE FIRST AMENDMENT RIGHTS ....	3
II. THE BAR HAS FAILED TO IDENTIFY A STATE INTEREST THAT WOULD JUSTIFY THE INFRINGEMENT ON PETITIONERS' FIRST AMENDMENT RIGHTS .....	5
A. The Bar Must Demonstrate a Compelling Governmental Interest.....	5
B. The Bar Has Failed to Identify a Compelling Governmental Interest .....	7
CONCLUSION .....	11

TABLE OF AUTHORITIES CITED

CASES	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977) .....	3, 4, 6, 11
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) .....	3, 6
Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984) .....	3, 10
Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984) .....	11
International Association of Machinists v. Street, 367 U.S. 740 (1961) .....	3, 4
Lathrop v. Donohue, 367 U.S. 820 (1961) .....	3, 4, 6, 8
Mallard v. District Court of Iowa, 490 U.S. ___, 104 L. Ed. 2d 318 (1989) .....	9
Roberts v. United States Jaycees, 468 U.S. 609 (1984) .....	3, 6, 7
United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) .....	5

In The

Supreme Court of the United States

October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GORDNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANEY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

On Writ Of Certiorari To The Supreme Court Of California

PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners, Eddie Keller, *et al.*, submit this reply brief to correct erroneous allegations of the respondents' brief

and to emphasize what appears to have become the central issue in this case--the nature of the State of California's interest in compelling all attorneys to belong and pay dues to an expressive association.

Initially, it is instructive to note the wide divergence of opinion between the State Bar of California (Bar), and the amici supporting its position. While the Bar continues to insist that there is no First Amendment issue in this case, amici, State Bar of Michigan and South Carolina State Bar, readily and forthrightly admit that compelled payments to a state bar do constitute an infringement on First Amendment rights. Similarly, while the Bar seeks to paint all of its ideological pronouncements as "government speech," amicus Lawyers' Committee for the Administration of Justice (led by James Brosnahan and made up of various individuals active in Bar programs and activities) claims that the Bar's positions are in reality the positions of the Bar's members, arrived at after full debate. In other words, while the Bar claims that there is no identity between the message and the members of the Bar, the Lawyers' Committee amicus, made up of former Bar presidents, board members, and activists, argues precisely the opposite. Thus, even with amicus "support," the Bar stands alone in many of the positions it takes before this Court.

Perhaps the most telling feature of the Bar's brief is its failure to address any of the decisions of other state Supreme Courts and Circuit Courts of Appeals that are in conflict with the decision here under review. Indeed, there is no rational point of distinction between those decisions and this case. The State of California has chosen to compel all attorneys to belong and pay dues to an

expressive association as a condition of practicing law in the state. The question before this Court is whether the interests of the state justify compelling attorneys to help finance political and ideological activities of the Bar with which they disagree. As we shall demonstrate, no such interest has been identified in this case.

---

## ARGUMENT

### I

#### MANDATORY MEMBERSHIP IN AND COMPELLED DUES PAYMENTS TO THE STATE BAR IMPLICATE FIRST AMENDMENT RIGHTS

The issue squarely presented in this case is whether compelled membership in and payments to an expressive association implicate First Amendment liberties.<sup>1</sup> The decisions of this Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), clearly hold such compulsion to infringe on First Amendment rights of speech and association. Relying on cases decided under the Equal Protection Clause (Respondents'

---

<sup>1</sup> Despite the Bar's assertion to the contrary (Respondents' Brief on the Merits at 13), nothing in this Court's decision in *Lathrop v. Donohue*, 367 U.S. 820 (1961), requires this Court to give preclusive effect to the determination of the California Supreme Court that the so-called "government speech" doctrine is the appropriate mode of analysis in this case.



Brief on the Merits (RB) at 15), the Bar labels its advocacy as "government speech" and argues that its compelled membership has no right to complain. This argument stands in marked contrast to the Bar's later claim that petitioners in this case are merely disputing the majority will of Bar members (RB at 21),<sup>2</sup> or that petitioners are seeking to enjoin the speech of delegates to the Bar's Conference of Delegates (RB at 23-24).

The most glaring error in the Bar's analysis is its reliance on Justice Harlan's concurring opinion in *Lathrop* for the proposition that First Amendment rights are not implicated by compelled membership in or fee payments to an expressive association. RB at 27. While this view is articulated in Justice Harlan's concurring opinion in *Lathrop* as well as in Justice Frankfurter's dissenting opinion (in which Justice Harlan joined) in *Street*, this Court's decision in *Abood* is a clear repudiation of that argument.

The Bar's argument also ignores its own structure and financing. As noted in the opening brief, the Bar is specifically exempt from the laws applicable to other government agencies. Petitioners' Opening Brief at 3. Its

---

<sup>2</sup> The Bar provides neither evidence nor record citation for its claim of "majority" support. Indeed, in a plebiscite vote of all members of the Bar, the membership was almost evenly split on the question of whether the Bar should be limited in its lobbying to "technical code revision, court reform, and other issues directly related to the regulation of the legal profession." Petition for Writ of Certiorari, Appendix F-44 and 45. When asked how the Bar should finance lobbying that was *not* limited to technical code reform and the like, 69.2% answered that such activity should be financed by *voluntary* contributions. *Id.* at F-45 and 46.

expenditures are not subject to review of the Legislature through the appropriation process or review of the Governor pursuant to his line item veto power. Its members exist only by force of legal compulsion. The financing for its political advocacy is derived from compelled annual membership dues payments. As explained by the Third Circuit, there exists in this case a "coerced nexus between the individual and the specific expressive activity." *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989).

## II

### THE BAR HAS FAILED TO IDENTIFY A STATE INTEREST THAT WOULD JUSTIFY THE INFRINGEMENT ON PETITIONERS' FIRST AMENDMENT RIGHTS

As petitioners have already conceded, the First Amendment rights asserted in this action are not absolute. The infringement on the freedom of speech and association inherent in the compelled membership and dues payments may be justified if supported by a sufficient governmental interest. Petitioners contend that that interest must be compelling, and that there must be an absence of a means of fulfilling that interest in a manner less injurious to First Amendment rights. The Bar has failed to identify any such interest in this case.

#### A. The Bar Must Demonstrate a Compelling Governmental Interest

In disputing the applicability of the compelling state interest/least drastic means test to this case, the Bar both ignores and misconstrues the decisions of this Court. In

*Roberts v. United States Jaycees*, this Court, citing *Abood*, ruled that interference with the First Amendment freedom of association may only be justified by a compelling state interest. *Roberts*, 468 U.S. at 623. The applicability of this analysis to cases involving compelled political contributions was affirmed in *Chicago Teachers Union v. Hudson*, 475 U.S. at 303 n.11. The Bar's dispute with this conclusion is twofold. To begin with, the Bar believes that the nature of the rights at stake are very limited. RB at 40. Secondly, the Bar misconstrues prior rulings of this Court to argue that the test is one of "germaneness." *Id.* at 9, 32.

The rights asserted by petitioners in this case are neither limited nor unimportant. In *Abood*, this Court held that the right to refrain from contributing to political causes with which one disagrees is no less protected by the First Amendment than the right to contribute in support. *Abood*, 431 U.S. at 233-35. This freedom was characterized as being at the core of the First Amendment. *Id.* The Bar's only response on this point is to reiterate the view of Justice Harlan in his concurring opinion in *Lathrop* that was ultimately rejected by this Court in *Abood*. Compare *Lathrop*, 367 U.S. at 860-61 (Harlan, J., concurring) with *Abood*, 431 U.S. at 233-35.

The Bar, citing *Abood*, argues that the standard to be applied in this case is one of "germaneness" rather than compelling state interest. RB at 9, 32. The flaw in this argument is that it skips a step in the analysis. While it is certainly true that the expenditures challenged must be "germane" to some governmental interest, that interest must be one that is compelling. See *Hudson*, 475 U.S. at 303 n.11; *Roberts*, 468 U.S. at 623. The requirement that specific expenditures under challenge must be "germane"

to that state interest is nothing more than the requirement that the compelling government interest is actually advanced by the challenged regulation. See *Roberts*, 468 U.S. at 623-24. Thus, in order to justify compelled membership and dues payments in support of the political activities challenged in this case, the Bar must establish that it is acting pursuant to a compelling governmental interest that is actually advanced by the contested regulation and cannot be accomplished by a means less injurious to First Amendment values. This, the Bar has failed to do.

#### **B. The Bar Has Failed to Identify a Compelling Governmental Interest**

Throughout its brief, the Bar claims to be acting in the "public interest" and to be aiding the "administration of justice." According to the Bar, it is its "administration of justice" functions that justify all of the challenged conduct. As used by the Bar (and the court below), the phrase "administration of justice" is nothing more than a shibboleth--a slogan devoid of meaning. The Bar makes no attempt to give that phrase any meaning, and indeed seeks to incant it in talismanic manner to support lobbying on issues as diverse as environmental protection and criminal penalties. RB at 22. Indeed, the court below ruled that applied to the Bar the term "administration of justice" was to be construed "broadly." After all, as that court noted, "[l]aws are the business of lawyers. . . . Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal."

Joint Appendix (JA) Vol. III at 579. This is to be compared with the use of the term "administration of justice" by the Wisconsin Supreme Court under review in *Lathrop*. The duty of the Wisconsin Bar committee charged with improving the "administration of justice" was to

" 'study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.' " 367 U.S. at 829 n.7.

Even Justice Harlan, on whose concurring opinion the Bar relies heavily (RB at 45), viewed the proposed lobbying activities of the Wisconsin Bar as being limited to "the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel." *Lathrop*, 367 U.S. at 864 (Harlan, J. concurring).

Contrast this with the California Bar's lobbying program that included such diverse issues as environmental law, comparable worth, armor piercing bullets, lifeline public utility rates, Aid to Families with Dependent Children, drug paraphernalia, low rent housing projects, and solid waste management plans, to name a few. JA Vol. I at 9-12.<sup>3</sup>

<sup>3</sup> For the first time in the seven year history of this litigation, the Bar attempts to inject a factual dispute. In its brief, the Bar claims that the "activities identified in the complaint are not supported by the record." RB at 5 n.3. This is a novel claim

(Continued on following page)

The Bar also attempts to rely on this Court's recent decision in *Mallard v. District Court of Iowa*, 490 U.S. \_\_\_, 104 L. Ed. 2d 318 (1989), to defend compelled support of its political programs. The Bar's argument is that lawyers have special obligations as officers of the court, and that these obligations are fulfilled through the aspects of an integrated bar association here under review. RB at 31, 45. *Mallard* does not stand for this proposition. Instead, the cited portions of *Mallard* refer to an individual attorney's ethical obligation to represent indigents. Compare RB at 31, 37, 45 with *Mallard*, 104 L. Ed. 2d at 332.

Absent from the Bar's argument is the source of any alleged "special obligation" of attorneys to render political judgments on a nuclear weapons freeze proposal or on handgun control. See JA Vol. I at 13. Nor does the Bar attempt to identify the nature of any "special privilege" of lawyers that would justify compelling all California attorneys to contribute to a lobbying program that considers such diverse topics as joint custody and armor piercing bullets. No such "professional obligation" exists. Further, to the extent that attorneys as officers of the

(Continued from previous page)

for the simple fact that the complaint was verified (JA Vol. I at 8-9) (and is therefore part of the evidentiary record) and the fact that each of the listed pieces of legislation on which petitioners claim the Bar lobbied also appear on the Bar's lobbying report filed with the California Secretary of State. Compare JA Vol. I at 9-12 with JA Vol. II at 241-45. Furthermore, the Bar's own brief admits to some of the challenged lobbying. E.g., RB at 22. It is simply too late in the day to contest the indisputable facts of this case.



court, owe "special obligations" to society, those obligations are of an ethical and individual nature. It is difficult to imagine the existence of an ethical obligation that can be satisfied by paying another to make political judgments on your behalf.

Finally, the Bar offers two separate defenses for the activities of the Conference of Delegates. First the Bar claims that the conference is analogous to the union conventions for which compelled fees were upheld in this Court's decision in *Ellis*. RB at 23. The failing of this argument lies in the failure of the Bar to analyze *why* the *Ellis* Court reached that result. In *Ellis*, this Court noted that the union in that case elected its officers at the national conventions in question. 466 U.S. at 448-49. Since the convention was necessary to maintenance of the union's corporate structure, compelling fee payers to finance those conventions was proper. *Id.* By contrast, the Bar is neither compelled to hold a Conference of Delegates, nor does it elect any of its officers at the conference. Indeed, the conference is not even open to all California attorneys. Instead, it is meant to be a conclave of local voluntary bar associations. JA Vol. II at 368. The *Ellis* decision ~~thus~~ provides no support for compelling petitioners to finance conference activity such as adopting resolutions in favor of ballot propositions concerning handgun control and a nuclear weapons freeze.

The Bar also argues that participants at the Conference of Delegates are exercising their own First Amendment rights, and petitioners therefore are prohibited from restraining or interfering with the activities of the conference. Aside from the obvious conflict with the Bar's "government speech" argument, this argument must fail

for the simple reason that the delegates have no First Amendment right to require others to finance or amplify their own speech.<sup>4</sup> Petitioners do not seek to foreclose any debates. They seek only to be free from the compelled association with and financing of such debates. The Bar, an association with no voluntary members, simply has no countervailing First Amendment rights to assert.<sup>5</sup>

---

## CONCLUSION

The Bar studiously ignores the nature of the activity challenged in this action. This case does not challenge the Bar's power to appoint a member to the Law Revision Commission or to advise the Governor of the qualifications of judicial appointees. Nor are the Bar's efforts to provide legal counsel to the indigent under attack.

---

<sup>4</sup> This Court's decision in *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984), is not to the contrary. That case does not hold that government may be compelled to subsidize speech, but only that if government does choose to subsidize speech, it may not discriminate on the basis of the content of the speech it will subsidize. *Id.* at 383-84.

<sup>5</sup> It is interesting to note that the conference is made up of representatives from *voluntary* bar associations. The members of those associations are free to resign should the association adopt viewpoints in conflict with their own. Similarly, the members of those organizations have a constitutional right to associate to advance political causes. See *Abood*, 431 U.S. at 233. The State Bar, however, has no voluntary members. Petitioners cannot withdraw from membership in a dispute over the Bar's political agenda without also forfeiting their right to practice law in the state.

Instead, it is the Bar's political and ideological advocacy unrelated to the regulation of the practice of law or improvement of the judicial system that is challenged. The Bar only briefly addresses these concerns by claiming that it has worked to "improve" environmental protection and has ensured "fair" criminal penalties. RB at 22. The Bar also claims to have improved the "quality" of the laws. RB at 37. Each of these claims are themselves subjective political judgments. Who is to say what is a "fair" criminal penalty? Who makes the determination of whether environmental protection has been "improved"? Under our system of governance, those questions are left, at least initially, to the political branches of government. It is for this reason that this Court has suggested that those elements of government may speak out on controversial issues. The Bar, however, has no assigned role to play in such determinations. There exists no compelling state interest for California to require petitioners, and all other attorneys, to belong and pay dues to the Bar for the purpose of advancing these political judgments. The decision of the California Supreme Court must, therefore, be reversed.

DATED: January, 1990.

Respectfully submitted,

RONALD A. ZUMBRUN

JOHN H. FINDLEY

\*ANTHONY T. CASO

\*Counsel of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive,

Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

*Attorneys for Petitioners*

MOTION FILED  
NOV 2 1989

No. 88-1905

3

In The

# Supreme Court of the United States

October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M.  
KINTER; DAVID LAMPE; GARRETT BEAUMONT;  
CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J.  
ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER;  
THOMAS HUNTER RUSSELL; NANCY L. SWEET;  
MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON;  
THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C.  
MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A.  
WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN  
LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE  
W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R.  
DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E.  
HANST; LEONARD HERR; ROBERT A. HINE; MARTA  
MACIAS; PHILLIP SCHAFFER; CRAIG A. SILBERMAN;  
DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

**On Writ Of Certiorari To The California Supreme Court**

## **MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF TRAYTON L. LATHROP IN SUPPORT OF PETITIONERS**

TRAYTON L. LATHROP  
(Counsel of Record, Pro Se)  
122 West Washington Avenue  
P. O. Box 1507  
Madison, Wisconsin 53701  
(608) 257-7766

14 PP



No. 88-1905

In The

# Supreme Court of the United States

October Term, 1989

---

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

---

**On Writ Of Certiorari  
To The California Supreme Court**

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
OF TRAYTON L. LATHROP IN SUPPORT OF  
PETITIONERS**

---

TO: THE HONORABLE SUPREME COURT OF THE UNITED STATES

Trayton L. Lathrop, a member of the bar of the Supreme Court of the United States respectfully moves the Court for leave to file his brief *amicus curiae* which is attached hereto.

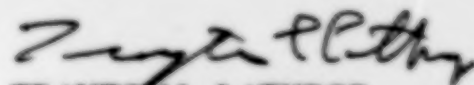
Consent to file a brief *amicus curiae* was requested of the petitioners and respondents by a letter dated October 13, 1989, a copy of which is on file with the clerk of court. The petitioners gave their

consent by a letter dated October 16, 1989, a copy of which is also on file with the clerk of court, but the respondents have not.

The movant is a member of the bar of the Supreme Court of Wisconsin and was the appellant in *Lathrop v. Donohue*, 367 U.S. 820 (1961), which has a bearing on this case. The interest of the movant is amplified in the attached brief.

The movant believes that the arguments presented in his brief may approach the issues differently than the arguments of the parties and that the brief will be helpful to the Court. The movant respectfully submits that it would be helpful and appropriate for the Court to look at the prospect, posed by the decision below, of converting the entire society into compulsory corporate organizations and also look at how this Court has abandoned the basis for its decision not to rule on the free speech question in *Lathrop v. Donohue*.

WHEREFORE, the movant prays that leave to file the attached brief *amicus curiae* be granted.



TRAYTON L. LATHROP  
(Counsel of Record, Pro Se)  
122 West Washington Avenue  
P. O. Box 1507  
Madison, Wisconsin 53701  
(608) 257-7766

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. IT IS AN INTERFERENCE WITH PERSONAL LIBERTY AND EQUAL PROTECTION RIGHTS TO COMPEL SUPPORT OF THE STATE BAR OF CALIFORNIA .....	3
II. THE BASIS OF THE PLURALITY'S DECISION TO NOT DECIDE THE FIRST AMENDMENT ISSUE IN <i>LATHROP</i> <i>v. DONOHUE</i> HAS BEEN ABANDONED BY THIS COURT. FORCED SUPPORT OF INTERESTED ASSOCIATIONS OR IDEOLOGIES IS NOT PERMITTED IN THE ABSENCE OF A COMPELLING STATE INTEREST, IF ANY .....	6
III. CONCLUSION .....	8

## TABLE OF AUTHORITIES

## Page

## Cases:

<i>Aboud v. Detroit Board of Education</i> , 431 U.S. 209 (1977).....	7
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936) .....	4
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986) .....	8
<i>Discontinuation of Wis. State Bar, Matter of</i> , 93 Wis. 2d 385, 286 N.W.2d 601 (1980).....	2,4
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....	3
<i>Hurtado v. California</i> , 110 U.S. 516 (1884) .....	4
<i>Keller v. The State Bar of California</i> , 47 Cal. 3d 1152, 767 P.2d 1020 (1989) .....	1,4
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961) .....	2,5,6,7
<i>Levine v. Heffernan</i> , 864 F.2d 457 (7 Cir. 1988) .....	2
<i>Levine v. Supreme Court of Wisconsin</i> , 679 F. Supp. 1478 (W.D. Wis. 1988) .....	2
<i>Pacific Gas and Electric Company v. Public Utilities Commission</i> <i>of California</i> , 475 U.S. 1 (1986) .....	7
<i>Railway Clerks v. Allen</i> , 373 U.S. 113 (1963) .....	7
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	3,5,8
<i>Reynolds v. United States</i> , 98 U.S. 145 (1879) .....	8
<i>State ex rel. Armstrong v. Board of Governors</i> , 86 Wis. 2d 746, 273 N.W.2d 356 (1979) .....	2
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943) .....	9

## Texts:

Commons, John R., <i>Institutional Economics</i> p. 883 (1934).....	5
---	---

No. 88-1905

In The

**Supreme Court of the United States**

October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M.  
KINTER; DAVID LAMPE; GARRETT BEAUMONT;  
CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER;  
CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J.  
ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER;  
THOMAS HUNTER RUSSELL; NANCY L. SWEET;  
MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON;  
THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C.  
MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A.  
WELLS PETERSEN,

Petitioners,

v.

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K.  
HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN  
LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE  
W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R.  
DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E.  
HANST; LEONARD HERR; ROBERT A. HINE; MARTA  
MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN;  
DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

Respondents.

**On Writ Of Certiorari  
To The California Supreme Court**

**BRIEF AMICUS CURIAE OF TRAYTON L. LATHROP  
IN SUPPORT OF PETITIONERS**

**INTEREST OF AMICUS CURIAE**

This brief is submitted in support of the petitioners in the above matter in their effort to secure a reversal of the decision of the California Supreme Court in *Keller v. The State Bar of California*, 47 Cal. 3d 1152, 767 P.2d 1020 (1989).

The undersigned has been licensed in the active practice of the law in the State of Wisconsin since February, 1948 and was admitted to practice before the Supreme Court of the United States on January



16, 1961. He is the senior active partner in a law firm comprising 29 lawyers at Madison, Wisconsin. He was the appellant, appearing *pro se*, in *Lathrop v. Donohue*, 367 U.S. 820 (1961) and is a member of the American Bar Association, the Bar Association of the Seventh Federal Circuit, the Federal Bar Association, the Wisconsin Intellectual Property Law Association and the Dane County Bar Association. He is a dues paying member of the State Bar of Wisconsin which was involved in *Lathrop v. Donohue*, *supra*, as a compulsory association, and has operated under orders of the Wisconsin Supreme Court as a voluntary association after the decision in *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988), reversed, *Levine v. Heffernan*, 864 F.2d 457 (7 Cir. 1988), *cert. den.*, October 3, 1989. He is the author of *The Racial Covenant Cases*, 1943 Wis. L. Rev. 508 (1948) and *The Fourteenth Amendment's Effect Upon State Laws Governing the Use of Land: A Comment on Evans v. Abney*, 55 Marq. L. Rev. 511 (1972). He was the principal counsel for the successful appellants in *Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981) and *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

The undersigned was one of five Wisconsin lawyers who conducted a poll in 1979 of the 9,319 active members of the State Bar of Wisconsin on the question "Do you favor the continuation of the State Bar of Wisconsin as an integrated bar?" The results of the poll were reported to the Wisconsin Supreme Court as follows: "1,892 affirmative and 2,820 negative." See *Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 386, 286 N.W.2d 601 (1980). The poll was taken after the Supreme Court of Wisconsin by a divided decision denied a petition by over 400 members of the State Bar of Wisconsin to have a poll taken on a similar question. *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 273 N.W.2d 356 (1979).

### SUMMARY OF ARGUMENT

An association of attorneys is as much an ideological organization as any other. It is an "interested" organization. It cannot be converted into a disinterested organization by labeling it as governmental or public. It is an interference with personal liberty and equal protection contrary to the Fourteenth Amendment to vest governmental power in such an association. The Wisconsin Supreme Court has recognized the impropriety by removing from the State Bar of Wisconsin functions pertaining to discipline and supervision of the education of lawyers.

The basis of the plurality's decision not to reach the free speech

done by this Court. It is no longer necessary that a person identify any particular issue that he opposes in declining to support an organization. In several decisions starting with *Elrod v. Burns*, 427 U.S. 347 (1976) this Court has held that forced support of interested organizations or ideologies except to the extent required by a compelling state interest violates the Fourteenth Amendment.

One speaks with his resources, whether they be time, talents or money. The state has no right to compel the use of those resources in the marketplace of ideas.

### ARGUMENT

#### 1. IT IS AN INTERFERENCE WITH PERSONAL LIBERTY AND EQUAL PROTECTION RIGHTS TO COMPEL SUPPORT OF THE STATE BAR OF CALIFORNIA

Each of the two questions for which this Court granted certiorari pertain to compelled financial support of an association of lawyers which "engages in" or uses the funds "to promote" "political and ideological activities."

We submit, first, that an association of attorneys such as the State Bar of California is an ideological association. If a compulsory association of physicians supports a bar association, an objecting physician could rightfully object to the compelled use of his funds for ideological activities.

One person's ideology often is another's firm foundation. Any association may be one man's anathema and another's joy. It is the association itself that often is perceived to embody the cause.

Part of the issue then is whether an association, the membership of which is limited to those engaged in a particular occupation or field of endeavor, is an ideological association for those persons so engaged. The answer to that question can only be answered "yes", we submit. Otherwise, it must be assumed that all persons in a given occupation have identical opinions and desires as to the goals of the association.

Another part of the issue is whether ideas may be boxed in by the government by giving an association organized along occupational lines a governmental function in addition to its usual associational activities. There are at least two answers to that question, we submit. The first is that the government should not be able to use an indirect means to regulate ideas. The second is that the government should not be able to delegate governmental power to private, interested groups which are not responsible to the citizens of the area in which the power is to be exercised. We submit that such delegation clearly offends the "one person, one vote" ruling of *Reynolds v. Sims*, 377 U.S. 533 (1964). We submit that such delegation offends "the funda-

mental principles of liberty and justice which lie at the base of all of our civil and political institutions, the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure" referred to in *Hurtado v. California*, 110 U.S. 516, 535 (1884). Delegation "not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others \* \* \* [is] an intolerable and unconstitutional interference with personal liberty. . . ." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

There exists a matter of definition. If an association is regarded as "interested" rather than "disinterested", we submit that it is "private" despite the labels placed on it. If it is interested or, in other words, private, the association is ideological; and, we submit, support of the organization may not be compelled, unless there is some overriding, compelling state interest which this Court deems to be controlling. Then it is only to the extent of that overriding interest that the liberty of the citizens to select their own governors and the liberty of free expression may be suppressed, if at all. We submit that an organization formed along occupational lines, such as the State Bar of California, not embracing all citizens in a particular area, is necessarily interested.

The Wisconsin Supreme Court has recognized the impropriety of delegating governmental power to an association organized along occupational lines by establishing disinterested agencies directly under the control of the Supreme Court for the education and discipline of lawyers. See 71 Wis. 2d xix (1975), 73 Wis. 2d xxi (1976), 74 Wis. 2d ix (1977) and *Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 386-387, 286 N.W.2d 601, 602 (1980).

Contrary to Wisconsin, the State of California by action of its legislature still vests in a bar association the examination and discipline of lawyers. And it provides for the government of the association by a board of 22 members, 15 of whom are elected by lawyers in geographical regions, one of whom is elected by the directors of the California Young Lawyers Association and six are appointed by the Governor of the state. The officers are elected by the board. There is also a conference of delegates consisting of representatives of various local and special bar associations and committees and sections. The association lobbies the legislature and files amicus curiae briefs. *Keller v. The State Bar of California*, *supra*, 767 P.2d at 1024-1025. Because California law treats the association as a governmental agency, the California Supreme Court, by a majority of its members, sanctions compulsory financial support of the association. *Id.* 767 P.2d at 1033.

The rationale of the ~~California~~ decision would apply to any delegation of governmental power to any association organized along private occupational or business lines.

The decision of the California Supreme Court if left standing, we submit, would open up to each state the authority to organize itself in the manner that John R. Commons, the noted professor of economics at the University of Wisconsin, observed in Italy six decades ago. He said ". . . In order to carry on business or get a job each individual is compelled to become a member or at least pay dues to his syndicate. . . . It is these compulsory corporations that have taken the place of parliament. They are both political and economic. . . ." Commons, John R., *Institutional Economics* p. 883 (1934).

If the states may, one by one, adopt such a compulsory corporate way of governing society, we respectfully submit that the federalism forged in the crucible of the Civil War and sharpened and finely tuned by more than a century of the decisions of this Court will break apart.

Citizens cannot have a right of suffrage as to particular matters if the governmental power with respect thereto is delegated to interested associations. When that happens the voting power of each member of the association may be hundreds or thousands of times the voting power of the ordinary citizen. As stated in *Reynolds v. Sims*, *supra*, the right of suffrage which "is of the essence of a democratic society" "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. at 555.

Wisconsin's Acting Governor Walter S. Goodland, in his message vetoing Wisconsin's Senate Bill 56 S (1943) (which is quoted at length at pages 40a to 42a of the jurisdictional statement in *Lathrop v. Donohue*, Case No. 200, United States Supreme Court October Term, 1960) stated:

The proposal of compulsory membership in any organization is contrary to Wisconsin legislative tradition. It is opposed to our conception of democracy and individual initiative. . . .

\* \* \*

. . . I am convinced that the people of this state believe in the honored tradition and principle of self-determination. This bill forbids that. It is a step further toward regimentation of the people.

\* \* \*

From its very inception, the legal profession has been recognized as semi-public servants of the people. It is the first line of defense in the guarding and protection of human



rights and liberties. Its training in and knowledge of the laws and constitution and the details and operation of government, pre-eminently qualify it as the protector and defender of human rights. It should be constantly on guard to oppose, at its very inception, the slightest attempt to encroach on the fundamental of human rights and liberties. In this instance that duty seems to have been forgotten or ignored, — for what reason, it is not my province to determine.

The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of bill No. 56, S, with its denials of individual freedom of action. If this were eliminated, I would very gladly sign it.

The issues, then, are basically issues going to the very basis of democracy, issues which *Reynolds v. Sims* recognizes as fundamental under the Fourteenth Amendment.

**II. THE BASIS OF THE PLURALITY'S DECISION TO NOT DECIDE THE FIRST AMENDMENT ISSUE IN *LATHROP v. DONOHUE* HAS BEEN ABANDONED BY THIS COURT. FORCED SUPPORT OF INTERESTED ASSOCIATIONS OR IDEOLOGIES IS NOT PERMITTED IN THE ABSENCE OF A COMPELLING STATE INTEREST, IF ANY**

The California Supreme Court, after reviewing *Lathrop v. Donohue*, 367 U.S. 820 (1961), stated that "the treatment of bar dues remains an unsettled question." 767 P.2d at 1025. We submit that the question is not unsettled in view of later decisions of this Court which require a result contrary to that of the California court below.

In *Lathrop v. Donohue*, the Court assumed that, to show a wrong, the appellant had to specify any causes that he opposed, saying:

Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position. . . . 367 U.S. at 845-46.

[T]here is no indication . . . of appellant's views on particular proposals. . . . 367 U.S. at 846.

[T]here is no indication in the record as to . . . how much has been expended for political causes to which appellant objects. . . . *Id.*

[O]n oral argument here appellant disclaimed any necessity to show that he had opposed the position of the State Bar on

any particular issue and asserted that it was sufficient that he opposed the use of his money for any political purposes at all. In view of the state of the record and this disclaimer, we think that we would not be justified in passing on the constitutional question considered below. . . . *Id.* at 847.

In his Petition for Rehearing or Other Relief, in *Lathrop v. Donohue*, the appellant stated "that he should be able to refuse to support a church he believes in without penalty from the state" p. 5 and that

*A governmental requirement that an individual belong to or financially support an association unless he swears that he does not believe in some of the policies of the association coerces the individual to reveal his beliefs — a violation of the freedom of speech and other liberty guarantees of the Fourteenth Amendment. It is appellant's position that the guarantees of liberty and of free speech are violated even when he is forced to support ideas which he may approve of in varying degrees. (p. 3, emphasis in the original.)*

Within two years after *Lathrop v. Donohue* this Court in *Railway Clerks v. Allen*, 373 U.S. 113, 118 (1963) held that ". . . it is enough that he manifests his opposition to any political expenditures by the union." (Emphasis in the original.) But the Court distinguished the *Lathrop v. Donohue* holding because it "was made in the context of constitutional adjudication, not statutory as here." *Id.* note 5 at 118, emphasis in the original. The Court came full circle in the constitutional case of *Abood v. Detroit Board of Education*, 431 U.S. 209, 240-241 (1977) saying "[a]lthough *Street* and *Allen* were concerned with statutory rather than constitutional violations, that difference surely could not justify any lesser relief in this case" and that:

As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. (Emphasis in the original.)

Thus, the reason for not reaching a decision in *Lathrop v. Donohue* has been abandoned.

Since *Lathrop v. Donohue*, this Court has made several significant decisions holding unconstitutional forced support of ideologies. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Abood v. Detroit Board of Education*, *supra*; *Pacific Gas and Electric Company v. Public Util-*



*ities Commission of California*, 475 U.S. 1 (1986) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). These decisions, we submit, are manifestations of the *Reynolds v. Sims* holding that the Fourteenth Amendment guarantees "the essence of a democratic society." 377 U.S. at 555. These decisions reiterate the quotation made by this Court over a century ago from the Virginia statute establishing religious freedom, drafted by Thomas Jefferson, that "to suffer the civil magistrate to intrude his powers in the field of opinion . . . is a dangerous fallacy. . . ." *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

One speaks with his resources. Even speaking on a street corner uses the resource of time. More often the resources are talents and money. The First Amendment concern is succinctly set forth in the plurality opinion of *Pacific Gas & Elec.*, *supra*, 475 U.S. at 11 as follows:

As we stated last Term: "The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas. There is necessarily . . . a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." (Emphasis in the original.)

We submit that compelled support of "interested" associations cannot stand up against the First and Fourteenth Amendments. And we submit that any association organized along occupational lines is "interested."

It has been nearly 30 years since the question of compelled support of an association of lawyers has been before this Court. We respectfully submit that the issue, then as now, is much greater than an issue regarding lawyers. It is an issue of whether the First and Fourteenth Amendments permit this nation, state by state, to undertake a compelled corporate style government which would be boxed in not according to geographical regions but according to occupations and professions and businesses.

We submit that the Court should determine that forced support of the California State Bar contravenes the Fourteenth Amendment.

### III. CONCLUSION

Associations of lawyers, as is the case with any other occupational group, are "interested" not disinterested. Their avowed interest may be to secure the very best for society. That is what is assumed to be the interest of a legislature every time it acts. But a legislature, if properly constituted, represents the whole people. An association of lawyers does not. And even the legislature should not use funds raised by the force of law to engage in the marketplace of ideas.

"Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

An occupational association represents at best those in the occupation or a portion thereof. The doctrine of *Reynolds v. Sims* is violated every time governmental power is delegated to an interested association. And it is violated when people are forced to financially support the whole or any part of the activities of the association. We submit the decision below should be reversed.

Respectfully submitted,

Trayton L. Lathrop  
*Amicus Curiae*  
 122 West Washington Avenue  
 P. O. Box 1507  
 Madison, Wisconsin 53701-1507  
 (608) 257-7766

November, 1989

MOTION FILED  
NOV 16 1989

No. 88-1905

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1988

EDDIE KELLER, *et alia*,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, *et alia*,

*Respondents.*

On petition for a writ of certiorari  
to the Supreme Court of California

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*  
OF THE NATIONAL RIGHT TO WORK  
LEGAL DEFENSE FOUNDATION,  
IN SUPPORT OF PETITIONERS  
and BRIEF *AMICUS CURIAE***

EDWIN VIEIRA  
13877 Napa Drive  
Independent Hill, Virginia 22111  
(703) 791-6780

*Counsel of Record for Amicus Curiae  
National Right to Work  
Legal Defense Foundation*

November 16, 1989

31 PP

No. 88-1905

---

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1988

---

EDDIE KELLER, *et alia*,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, *et alia*,

*Respondents.*

---

On petition for a writ of certiorari  
to the Supreme Court of California

---

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS*  
*CURIAE* OF THE NATIONAL RIGHT TO WORK  
LEGAL DEFENSE FOUNDATION,  
IN SUPPORT OF PETITIONERS**

---

Pursuant to Rule 36.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners. Respondent State Bar of California has refused consent for the filing of this brief.

**INTEREST OF THE *AMICUS CURIAE***

The National Right to Work Legal Defense Foundation is a non-profit, charitable organization formed to provide free legal assistance to individual employees who,



as a consequence of their subjection to compulsory unionism, suffer violations of their right to work; freedoms of association, speech, petition, and religion; right to procedural due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States.

To this end, the Foundation has supported several major constitutional cases involving the right of employees to refrain from paying, in whole or in part, compulsory dues and fees to labor organizations for those organizations' use in legislative and judicial lobbying or other forms of ideological activism. These cases include *Abood v. Detroit Board of Education*<sup>1</sup>, *Ellis v. Railway Clerks*<sup>2</sup>, and *Chicago Teachers Union v. Hudson*<sup>3</sup>.

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Supreme Court of California could seriously undermine the constitutional rights of nonunion employees heretofore established in *Abood*, *Ellis*, and *Hudson* with respect to the expenditure of compulsory dues and fees by unions for ideological causes.

#### PURPOSE OF THE BRIEF *AMICUS CURIAE*

Because petitioners will naturally focus on their particular circumstances as they relate to the context of an integrated bar in a single State, they may not sufficiently emphasize the general nationwide importance of the decision of the Supreme Court of California as it relates, or could be applied, to other arrangements or situations involving compulsory dues and fees, particularly in the

---

<sup>1</sup>431 U.S. 209 (1977).

<sup>2</sup>466 U.S. 435 (1984).

<sup>3</sup>475 U.S. 292 (1986).

labor-relations context with which the Foundation is uniquely concerned.

Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the significance of the ruling and reasoning of the Supreme Court of California, and the pressing need for reversal here.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

RAYMOND J. LAJEUNESSE  
National Right to Work  
Legal Defense Foundation  
Suite 600  
8001 Braddock Road  
Springfield, Virginia 22611  
(703) 321-8510

EDWIN VIEIRA, *Counsel of Record*  
13877 Napa Drive  
Independent Hill, Virginia 22111  
(703) 791-6780

Attorneys for *Amicus Curiae*  
National Right to Work  
Legal Defense Foundation

No. 88-1905

---

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1988

---

EDDIE KELLER, *et alia*,  
*Petitioners*,

v.

STATE BAR OF CALIFORNIA, *et alia*,  
*Respondents*.

---

On petition for a writ of certiorari  
to the Supreme Court of California

---

**BRIEF *AMICUS CURIAE*  
OF THE NATIONAL RIGHT TO WORK  
LEGAL DEFENSE FOUNDATION,  
IN SUPPORT OF PETITIONERS**

---

EDWIN VIEIRA  
13877 Napa Drive  
Independent Hill, Virginia 22111  
(703) 791-6780

*Counsel of Record for Amicus Curiae  
National Right to Work  
Legal Defense Foundation*

November 16, 1989

---

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
INTEREST OF THE <i>AMICUS CURIAE</i> .....	2
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
I. The Supreme Court of California's characterization of the State Bar of California as a "governmental agency" frames, but does not answer, the fundamental First-Amendment issue here for decision .....	5
II. If government may insulate from constitutional scrutiny the lobbying and other legislative and judicial activism of a private group composed in part of invol- untary members by labelling that group a "governmental agency", no limits exist to the complete political and ideological regimentation of American society .....	14
CONCLUSION .....	19



# TABLE OF AUTHORITIES

## Cases

### Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) . . . . .	<i>passim</i>
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) . . . . .	18
American Communications Association v. Douds, 339 U.S. 382 (1950) . . . . .	6
Bigelow v. Virginia, 421 U.S. 809 (1975) . . . . .	8
Board of Education v. Barnette, 319 U.S. 624 (1943) . . . . .	19-20
Branti v. Finkel, 445 U.S. 507 (1980) . . . . .	13
Buckley v. Valeo, 424 U.S. 1 (1976) . . . . .	4
City of Madison, Joint School District No. 8 v. WERC, 429 U.S. 167 (1976) . . . . .	8, 12-13
Communications Workers v. Beck, ____ U.S. ____, 108 S. Ct. 2641 (1988) . . . . .	20
Ellis v. Railway Clerks, 466 U.S. 435 (1984) . . . . .	3
Elrod v. Burns, 427 U.S. 347 (1976) . . . . .	13
Flast v. Cohen, 392 U.S. 83 (1968) . . . . .	5
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) . . . . .	17-18

# TABLE OF AUTHORITIES—CONTINUED

## Page

Keller v. State Bar of California, 767 P.2d 1020 (Cal. 1989) . . . . .	<i>passim</i>
Lathrop v. Donohue, 367 U.S. 820 (1961) . . . . .	3, 17
Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) . . . . .	16
Machinists v. Street, 367 U.S. 740 (1961) . . . . .	3-4, 20
NAACP v. Button, 371 U.S. 415 (1963) . . . . .	8
NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967) . . . . .	6
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . . . . .	8
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) . . . . .	9
Riley v. National Federation of the Blind, ____ U.S. ____, 108 S. Ct. 2667 (1988) . . . . .	8
Rowan v. Post Office Department, 397 U.S. 728 (1970) . . . . .	14

TABLE OF AUTHORITIES—CONTINUED

	<i>Page</i>
Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) .....	6, 9, 15, 17
United States v. Darby, 312 U.S. 100 (1941) .....	16
Vaca v. Sipes, 386 U.S. 171 (1967) .....	6

**Constitutions**

U.S. Const. art. I, § 8, cl. 3 .....	16
U.S. Const. amend. I .....	<i>passim</i>

**Statutes and Rules**

Federal Election Campaign Act of 1971	
2 U.S.C. § 441b .....	10
Internal Revenue Code	
26 U.S.C. § 501(c)(5) .....	10
Minnesota Statutes	
§ 179 A.06, subd. 3 .....	11
National Industrial Recovery Act	
Act of 16 June 1933, ch. 90, § 3 (a,b), 48 Stat. 195, 196 .....	17, 18

TABLE OF AUTHORITIES—CONTINUED

	<i>Page</i>
National Labor Relations Act	
§ 8(a)(3), 29 U.S.C. §158(a)(3) .....	11
Labor Management Reporting & Disclosure Act	
29 U.S.C. §§401-531 .....	10
Rules of the Supreme Court of the United States	
Rule 36.3 .....	1

**Miscellaneous**

Encyclopaedia Britannica (1963 ed.) .....	7
F. Pitigliani, The Italian Corporative State (1933) .....	7

No. 88-1905

---

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1988

---

EDDIE KELLER, *et alia*,  
*Petitioners*,

v.

STATE BAR OF CALIFORNIA, *et alia*,  
*Respondents*.

---

On petition for a writ of certiorari  
to the Supreme Court of California

---

**BRIEF AMICUS CURIAE  
OF THE NATIONAL RIGHT TO WORK  
LEGAL DEFENSE FOUNDATION,  
IN SUPPORT OF PETITIONERS**

---

**INTRODUCTION**

Pursuant to a motion for leave to file under Rule 36.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation submits this brief *amicus curiae* in support of petitioners.



## INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

## SUMMARY OF THE ARGUMENT

I. The Supreme Court of California erroneously substitutes mere labels for reasoned analysis—assuming that, by characterizing the State Bar of California as a “governmental” entity for purposes of California law, it can avoid the strictures of United States constitutional law that this Court applied to labor unions in the *Abood* line of cases. However, from the special perspective of the First Amendment, no significant operational distinction exists between:

- (i) the State Bar of California—a membership-organization of private individuals which California law invests with state authority sufficient to give it some “governmental” character; and
- (ii) a labor union acting as an “exclusive representative” of nonunion employees—also a membership-organization of private individuals which state or federal law invests with authority sufficient to characterize its acts in that role as “governmental action”.

Thus, the proscriptions against the use of compulsory dues and fees by labor unions for lobbying and other legislative and judicial activities must apply *tout court* to the State Bar of California.

II. Any other result would license Congress and the State legislatures to nullify *Abood*<sup>1</sup>, *Ellis*<sup>2</sup>, and related cases by the merely verbal expedient of defining as a species of “governmental” entity a labor union acting as an “exclusive representative” of nonunion employees under color of statute. And this license—applied to other discrete professional, economic, and social groups—could eventuate in the radical politicization of this country into the “goose-stepping brigades” of political conformists “at least partially regimented behind causes which they oppose” against the creation of which Mr. Justice Douglas foresightedly premonished this Court in *Lathrop v. Donohue*<sup>3</sup>.

## ARGUMENT

Perhaps the most eloquent summary of the fundamental principle animating the line of this Court's decisions in which *Abood* occupies the temporal center is the statement of Mr. Justice Black in *Street* that

[p]robably no one would suggest that [a legislature] could, without violating [the First] Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain \* \* \* groups favored by the Government to \* \* \* promote their controversial causes. Compelling a man by law to pay his money to \* \* \* advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for \* \* \* a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.

---

<sup>1</sup>Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

<sup>2</sup>Ellis v. Railway Clerks, 466 U.S. 435 (1984).

<sup>3</sup>367 U.S. 820, 884 (1961)(dissenting opinion)(footnote omitted).

There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it. \* \* \* But a different situation arises when a \* \* \* law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do. Such a law, even though validly passed by [the legislature], cannot be used in a way that abridges the specifically defined freedoms of the First Amendment. And whether there is such abridgment depends not only on how the law is written but also on how it works.

There can be no doubt that the [law under scrutiny] here, as it actually works, takes a part of the earnings of some men and turns it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law. This injects [governmental] compulsion into the political and ideological processes, a result which \* \* \* everyone would agree the First Amendment was particularly intended to prevent.<sup>4</sup>

Attempting to avoid application of this principle to the State Bar of California, the Supreme Court of California "conclude[s] that the State Bar, considered as a government agency, may use [compulsory] dues for any purpose within the scope of its statutory authority", including lobbying and litigation that some members of the Bar oppose; and that the Bar's "use of dues" is not "subject to restrictions hitherto imposed only on labor unions and other private associations", because "no precedent supports the imposition of such restrictions on a governmental

---

<sup>4</sup>*Machinists v. Street*, 367 U.S. 740, 788-89 (1961)(dissenting opinion)(footnotes omitted), *cited in* *Buckley v. Valeo*, 424 U.S. 1, 91 n.124 (1976).

agency".<sup>5</sup> This decision is both fatuous in terms of constitutional analysis and fatal, not only to First-Amendment freedoms generally, but even to the continued existence of republican government in both California and the United States.

**I. The Supreme Court of California's characterization of the State Bar of California as a "governmental agency" frames, but does not answer, the fundamental First-Amendment issue here for decision.**

A. The majority opinion of the Supreme Court of California is a sorry example of *petitio principii*. To be sure, if the State Bar of California can properly be "considered as a government agency" in a sense that precludes application to it of the federal constitutional principles of *Abood* and related cases, then the "restrictions hitherto imposed only on labor unions and other private associations" do not apply, by hypothesis. The question the Supreme Court of California leaves unanswered, however, is: "Why should the Bar be 'considered as a government agency' in that special—indeed, unique—sense?"<sup>6</sup>

The explanation for the California court's confusion appears in its inaccurate reference to the "restrictions hitherto imposed only on labor unions and other private associations". As this statement evidences, the court fails to recognize that, if "the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority", so too may a labor

---

<sup>5</sup>*Keller v. State Bar of California*, 767 P.2d 1020, 1030 (Cal. 1989).

<sup>6</sup>The Foundation here assumes *arguendo* that, indeed, true "governmental agencies" enjoy some narrow immunity from First-Amendment scrutiny of their expenditures. *But cf.* *Flast v. Cohen*, 392 U.S. 83 (1968).



union, considered solely as a private organization, use its dues for any purpose within the scope of its otherwise lawful by-laws. Yet, *Abood* and related cases hold that a seemingly "private" labor union may not constitutionally use dues and fees compulsorily extracted from nonmembers for purposes unrelated to the collective bargaining it performs as those employees' statutory "exclusive representative". Of course, the antinomy is only apparent: For a labor union acting as the statutory "exclusive representative" of nonmembers cannot be considered solely as a "private" organization for purposes of the First Amendment, in as much as its status and power as "exclusive representative"—from which derive its claim and ability to collect compulsory dues and fees—are the products of "governmental action".<sup>7</sup>

But such analysis applies equally to the State Bar of California! As is a labor union operating under the statutory principle of "exclusive representation", *au fond* the Bar is an organization composed of private individuals compelled by law to become "members" as a condition of their employment (the practice of law), to acquiesce in its "representation" of and control over that employment, and to finance Bar activities through compulsory dues and fees. As does such a labor organization, the Bar exercises extraordinary statutory authority, purportedly in pursuit of various "public interests", under the regulatory supervision of the government. Thus, as is a labor organization serving as an "exclusive representative", the Bar is inher-

---

<sup>7</sup>In addition to *Abood*, 431 U.S. at 226 (Michigan Public Employment Relations Act), see *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-99, 203 (opinion of the Court), 208 (Murphy, J., separate opinion) (1944) (Railway Labor Act), and *American Communications Ass'n v. Douds*, 339 U.S. 382, 401-02 (1950); *Vaca v. Sipes*, 386 U.S. 171, 181-83 (1967); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81 (1967) (National Labor Relations Act).

ently and ineradicably private by virtue of its natural composition, and only incidentally and changeably "governmental" by virtue of its acquired statutory authority. Therefore, as may a union, the Bar may be described as "governmental" in character because the power it exercises over its members is the product of "governmental action". However, this "governmental" character derives entirely from the Bar's special statutory status *superadded* to the pre-existent and ever-continuing private nature of its individual members, which the metaphorically "governmental" character of the Bar never fundamentally changes.<sup>8</sup>

The implicit teaching of *Abood* is that the inherently and unchangeably private nature of the Bar—its composition of private lawyers—is controlling for purposes of

---

<sup>8</sup>Revealingly, the Supreme Court of California never suggests either that the supposed "governmental" character of the Bar derives from some pre-existent "governmental" character of its individual members, or that the supposed "governmental" character of the Bar reflexively infuses those members, as individuals, with some identity as "governmental" agents or actors. Of course, in a true "governmental agency", contrastingly, both the agency and the agents partake of the "governmental" character in a mutually reciprocal fashion.

The major source of intellectual difficulty here is that the Bar is neither "private" nor "governmental", but economically and politically hermaphroditic. It exemplifies a so-called "corporate-state" structure, in which a group of private individuals collectively exercise delegated governmental authority purportedly in a manner simultaneously conducive to both the public interest and the group members' special private interests. The theory of corporate-state organization of society was widely discussed in the 1920s and 1930s, but is little studied today. See 6 *Encyclopaedia Britannica*, "Corporate State" (1963 ed.), at 524. The leading exponents of corporate-state institutions at that time were primarily Italian (although those institutions have had, and still have, forceful advocates among British, French, German, and American schools of political science). See, e.g., F. Pitigliani, *The Italian Corporate State* (1933). Perhaps for this reason the California court need not be especially faulted for not fully coming to grips with the problem facing it.



constitutional analysis.<sup>9</sup> The Supreme Court of California may be correct to describe the Bar in some Orwellian sense as a "a governmental agency" under the California constitution and the State's statutes and court decisions. But, under the Constitution of the United States—and particularly with respect to the freedoms of speech, association, and petition protected by the First Amendment—what California quixotically labels "a governmental agency", if composed of private individuals including compulsory members, is and can be no more than a private organization infused with "governmental action".<sup>10</sup> That "governmental action" is the predicate for constitutional scrutiny of and limitations on the latitude of the organization's infringements of its members' First-Amendment liberties. It does not immunize those infringements from correction, as the California court wrongly presumes.

B. The ways in which "[t]he California Constitution, statutes, and judicial decisions \* \* \* appear to envision the [B]ar as a governmental agency" detract from this con-

---

<sup>9</sup>Although *Abood* involved actual government employees, no one even suggested in that case that the labor union certified as those employees' "exclusive representative" was a "governmental agency" in the sweeping sense the Supreme Court of California applies to the California Bar.

See also the cases cited by the dissent below for the proposition that "membership" of private individuals compelled by law "subjects an association—whether private or governmental [in name]—to First Amendment constraints". Keller, 767 P.2d at 1042-43 (Kaufman, J., concurring and dissenting).

<sup>10</sup>Surely, the State's mere choice of label has no preclusive effect on the First-Amendment issue. See *City of Madison, Joint School Dist. No. 8 v. WERC*, 429 U.S. 167, 173-74 & n.5 (1976). Accord, *NAACP v. Button*, 371 U.S. 415, 429 (1963), followed in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Riley v. National Fed'n of the Blind*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 2667, 2677 (1988).

clusion not at all.<sup>11</sup> For in none of these ways is the Bar sufficiently distinguishable from a labor union designated the "exclusive representative" of dissenting employees to vitiate the primary identity between the two: a membership of private individuals compelled by "governmental action" to finance the organization's activities.

1. That the Bar is a "public corporation" under the California constitution proves nothing. For a "public corporation" in the peculiar case of the Bar is simply an organization subject to legislative and judicial regulation under the "police power" that is vested with some governmental authority and performs some governmental function with respect to a segment of the population "which, by reason of career, shares common interests".<sup>12</sup> This is also an apt description of a labor union invested with the authority of an "exclusive representative"<sup>13</sup>—especially in the public sector, where collective bargaining between the union and a governmental employer clearly appears as a governmental function.<sup>14</sup>

2. That the Bar's 22-member "Board of Governors includes six public members appointed by the Governor, who are not members of the [B]ar"<sup>15</sup> proves no more.<sup>16</sup> A controlling majority of the board is still elected by the

---

<sup>11</sup>Keller, 767 P.2d at 1025-27.

<sup>12</sup>*Id.* at 1026, 1029 n.15.

<sup>13</sup>See, e.g., *Steele*, 323 U.S. at 198-99, 203.

<sup>14</sup>See, e.g., *Abood*, 431 U.S. at 228-29.

<sup>15</sup>Keller, 767 P.2d at 1026.

<sup>16</sup>*Cf. Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866-67 (1824)(directors of bank appointed by President and confirmed by Senate are not "Officers of the United States").

private lawyers who comprise the Bar, as in a labor union or any other private organization.

3. Neither does the Bar's tax-exempt status have any peculiar constitutional significance.<sup>17</sup>

4. Nor does California's regulation of the Bar's meetings, its procedures, or the privileges of its officers imply any difference of constitutional dimension between it and a labor union.<sup>18</sup>

5. Nor does application of the California tort claims act to the Bar imply anything important, in as much as the act explicitly covers every public corporation in the State.<sup>19</sup> And,

6. Far from establishing a constitutional distinction, the statutory prohibition against the Bar's "conduct[ing] or participat[ing] in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice"<sup>20</sup> could reflect no more than the California legislature's intent to preclude the Bar from misusing compulsory dues for a form of political proselytism, not unlike election-campaign restrictions on unions at the federal level.<sup>21</sup>

In short, nothing the California Supreme Court advances to distinguish the Bar as a supposedly "govern-

---

<sup>17</sup>See Internal Revenue Code § 501(c)(5).

<sup>18</sup>See Labor Management Reporting & Disclosure Act, 29 U.S.C. §§ 401-531.

<sup>19</sup>Keller, 767 P.2d at 1027 & n.10.

<sup>20</sup>*Id.* at 1027.

<sup>21</sup>See 2 U.S.C. § 441b.

mental agency" from a supposedly "private" labor union acting as an "exclusive representative" under color of state or federal law detracts from the identity of the two for all constitutional purposes relevant here.<sup>22</sup>

C. Of course, that the principles of *Abood* and related cases apply to the Bar still leaves the questions of whether (i) expenditures of its members' compulsory dues and fees on tendentious briefs *amici curiae* and lobbying subserve a "compelling state interest" and, if they do, (ii) whether such expenditures are the means "least restrictive" of dissenting lawyers' First-Amendment freedoms. To these questions, though, the answers are obvious.

1. Because the Bar "regularly acts on behalf of the special interest of its members", as well as "to promote the public interest,"<sup>23</sup> two classes of judicial and legislative activism by the Bar need to be distinguished one from the other. First, no "compelling state interest"—indeed, no legitimate "state interest" at all—exists in forcing dissenting members of the Bar to subsidize judicial and legislative activism aimed at promoting the special professional or economic interests of the Bar as a whole, let alone discrete segments of the Bar that do not include the dissenters. No legislature has the authority to politicize a profession, occupation, trade, or economic class by requiring individuals to accept spokesmen for the group (no matter how selected) to determine what shall constitute "ortho-

---

<sup>22</sup>Respondent California State Bar adds to this litany the observations that the Bar "is required to obtain explicit legislative approval before assessing any fees", and that "the legislature passes a bill authorizing assessments at the level it deems appropriate". Respondent's Brief in Opposition in No. 88-1905, at 5. This, however, is no different in principle from the governmental oversight of labor-union compulsory dues and fees common in the public and private sectors. See, e.g., Minn. Stat. § 179A.06, subd. 3; National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3).

<sup>23</sup>Keller, 767 P.2d at 1025.



doxy" with respect to legislation and judicial decisions that may affect the welfare of the group's members.

The rationalization for "exclusive representation" with respect to negotiation of terms and conditions of employment in the labor-relations context is that

[t]he designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment \* \* \* prevents inter-union rivalries from creating dissension within the work force and \* \* \* frees the employer from the possibility of facing conflicting demands from different unions \* \* \*.<sup>24</sup>

Self-evidently, this rationalization has no bearing whatsoever where no actual negotiations between employers and employees are involved. Rather, what might appear as undesirable "confusion", "rivalries", "dissension", and "conflicting demands" in a labor-relations context constitute the very plurality and diversity of views, robust debate, and political and ideological competition that the First Amendment guarantees in the legislative arena. So, in the latter context no room exists for governmentally imposed monopolies of political "truth" or "wisdom", whether the monopolists attempt to silence dissenters altogether,<sup>25</sup> or (as here) to compel dissidents to subsidize the legislative or judicial lobbying the dissidents oppose. Indeed, "[t]o permit one side of a debatable public question to have a

<sup>24</sup> *Aboud*, 431 U.S. at 220-21.

<sup>25</sup> *E.g.*, *City of Madison, Joint School Dist. No. 8 v. WERC*, 429 U.S. 167 (1976), especially at 175-76 & n.10.

monopoly in expressing its views to the government is the antithesis of constitutional guarantees".<sup>26</sup>

*Second*, no "compelling state interest" exists in forcing dissident members of the Bar to subsidize judicial and legislative activism aimed at promoting an ostensibly "public" interest, either. True, as the California court noted,

[t]he drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal.<sup>27</sup>

But equally true is the likelihood—yea, the moral certainty—that "among the members of the State Bar are some" who will disagree—on technical, professional, political, moral, or purely personal grounds—with those others "whose collective advice" the Bar chooses to proffer to the legislature at the dissenters' expense. In as much as the legislature cannot appreciably benefit from being presented with an apparent, but actually artificial and deceptive compelled "consensus" among the State's lawyers, the compulsory subsidization of lobbying by the Bar even in this case ultimately serves no purpose beyond that of

<sup>26</sup> *Id.* at 175-76 (footnote omitted). Even though the Bar does not attempt to silence dissenting members outright, it does obtain a practical "monopoly in expressing its views to the government" *pro tanto*, to the extent that it can expend dues and fees extracted from dissenters and thereby diminish their abilities to promote the legislation, litigation, and other causes they may favor. See *Branti v. Finkel*, 445 U.S. 507, 513-14 (1980); *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976).

<sup>27</sup> *Keller*, 767 P.2d at 1030.



advancing the perceptions of one segment of the Bar as to what constitutes the "public good" in particular areas of legislation.<sup>28</sup>

2. Moreover, compulsory subsidization of judicial and legislative lobbying is not the alternative "least restrictive" of the First-Amendment freedoms of dissident California lawyers. If the Bar actually subserves true public interests by informing the courts and the legislature of its members' collective position on various matters in their capacities as "legal experts" (rather than special pleaders for their own private interests), the legislature may fund those activities from general taxes to whatever level it deems desirable.<sup>29</sup>

**II. If government may insulate from constitutional scrutiny the lobbying and other legislative and judicial activism of a private group composed in part of involuntary members by labelling that group a "governmental agency", no limits exist to the complete political and ideological regimentation of American society.**

Shou'd this Court accept the thesis of the majority of the Supreme Court of California that, merely by labelling a private group a "governmental agency" the government may insulate the lobbying and other legislative and judicial activism of that group from constitutional scrutiny, potentially disastrous consequences could, and likely will, follow

---

<sup>28</sup>Certainly no justification exists in the notion that the Bar should be licensed to force its refractory members to lend their (unwilling) support to "good" causes. For "no one has a right to press even 'good' ideas on an unwilling recipient". *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970).

<sup>29</sup>Under the circumstances postulated in the text, most of the knotty First-Amendment problems implicated in this case would disappear. For "[c]ompelled support of a private association is fundamentally different from compelled support of government". *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment).

for political and ideological pluralism in this country, both in the narrow area of labor relations and generally throughout society.

A. The perverse reasoning of the California court directly undermines the *Abood* doctrine. If an otherwise private labor union functioning as an "exclusive representative" under color of state or federal law can be (to use the weasel-words of the California court) "*considered as a government agency*" [emphasis supplied], then the restrictions this Court has fashioned against such a union's expenditure of compulsory dues and fees on lobbying and other legislative and judicial activism evaporate.

The California court's decision implicitly instructs those anxious to advance the political power of compulsory unionism how this can be done—namely, by investing unions with the salient characteristic that the court says primarily distinguishes the Bar "as a government agency" from a labor union as a "private" organization: *i.e.*, designation of the union as a "public corporation" or equivalent entity. This is hardly fanciful or unlikely. For all unions functioning as statutory "exclusive representatives" have been "formed (at least in part) for \* \* \* governmental purposes and vested with \* \* \* governmental powers" over "a portion of the state"<sup>30</sup> in the sense that the statutes under color of which the unions operate

clothe the bargaining representative[s] with powers comparable to those possessed by a legislative body both to create and restrict the rights of those [employees] whom [the unions] represen[t] \* \* \* .<sup>31</sup>

---

<sup>30</sup>*Keller*, 767 P.2d at 1026.

<sup>31</sup>*Steele*, 323 U.S. at 202.

Moreover, if "legislative and judicial regulation" under the "police power" is "sufficient to classify the [B]ar as a public corporation",<sup>32</sup> such a classification surely applies in principle to labor unions certified under color of law as "exclusive representatives". For compulsory unionism is nothing if not the product of extensive and pervasive "legislative and judicial regulation" of the relationship of employment under the "police power" at the state level<sup>33</sup> or the constitutionally equivalent "commerce power" at the national level.<sup>34</sup>

Thus, a legislative or judicial declaration that labor unions functioning as "exclusive representatives" are somehow "public" entities (in the broad sense defined above) would be an accurate label.<sup>35</sup> And if the mere application of labels can defeat the enforcement of constitutional guarantees, as the decision of the California court teaches here, then recognition that labor unions functioning as "exclusive representatives" under color of law are "public" entities carries with it an extension to them of blanket immunities from First-Amendment limitations on their expenditures of compulsory dues and fees for legislative and judicial lobbying.

This, of course, will rapidly result in the regimentation, in every area of employment subject to compulsory collec-

---

<sup>32</sup>Keller, 767 P.2d at 1026.

<sup>33</sup>See, e.g., *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949).

<sup>34</sup>U.S. Const. art. I, § 8, cl. 3. See, e.g., *United States v. Darby*, 312 U.S. 100, 114-15 (1941) ("exercise [of commerce power] is attended by the same incidents which attend the exercise of the police power of the states").

<sup>35</sup>Assuming *arguendo* that compulsory collective bargaining through "exclusive representation" is properly a "governmental function" in either the public or the private sector.

tive bargaining, of the "goose-stepping brigades" of political and ideological conformists that Mr. Justice Douglas foresaw in *Lathrop*.<sup>36</sup> For vanishingly few unions will shrink from offering Congress and the state legislatures their "expert assistance" with respect to proposed or pending legislation concerning what the unions perceive as their members' economic, social, and political interests.<sup>37</sup>

B. More than this, however, will likely follow. Unions are not the only private associations or groups that are, can be, or have been organized around the statutory principle of "exclusive representation". At the outset of the Great Depression, the National Industrial Recovery Act (NIRA) authorized private "trade or industrial associations or groups" to lobby for presidential approval of "codes of fair competition for the trade or industry represented by the applicants" (the so-called "code authorities"), and made these "codes" the "standards of fair competition for [each] such trade or industry" upon the President's approval.<sup>38</sup> The sole substantive requirement on the private "associations or groups" licensed to act as "exclusive representatives" of their respective trades or industries was that they "impose no inequitable restrictions on \* \* \* membership \* \* \* and are truly representative of such trades or industries".<sup>39</sup>

---

<sup>36</sup>367 U.S. at 884-85 (dissenting opinion)(footnote omitted).

<sup>37</sup>Arguably, if lobbying by the Bar is proper to provide the legislature with the Bar's "expert legal assistance", then lobbying by any union should be equally proper to provide the legislature with the latter's "expert assistance" in the area in which its members are qualified.

<sup>38</sup>Act of 16 June 1933, ch. 90, § 3(a, b), 48 Stat. 195, 196.

<sup>39</sup>NIRA § 3(a), 48 Stat. at 196. Compare the so-called "duty of fair representation" that this Court imposed on unions acting as exclusive representatives under federal law. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944)(Railway Labor Act); *Ford Motor Co. v.*



Thus, on a national, industry-wide scale the NIRA fit perfectly into the corporative-state pattern that the California Bar apes at the state level for a single professional group: (i) The government recognized private groups, organized on the basis of "exclusive representation", as the "legislative spokesmen" for all individual firms in each branch of production. And (ii) it empowered those groups to lobby on behalf of all members of the "code authorities", including dissenters, for the enactment of "codes" binding on all members of the industries after approval by the President.

When a dissident member of one "code authority" challenged the act, "[t]he Government urge[d] that the codes [would] 'consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems'".<sup>40</sup> To that argument, this Court retorted:

[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for . . . their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.<sup>41</sup>

---

Huffman, 345 U.S. 330 (1953)(National Labor Relations Act).

<sup>40</sup>A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). Compare Keller, 767 P.2d at 1030-31.

<sup>41</sup>Schechter, 295 U.S. at 537.

The Supreme Court of California, however, has now created a childishly simple device by which private groups in all conceivable walks of economic and social life throughout the United States can be "constituted legislative bodies": structure those groups as "public corporations" and label them "governmental agencies"! Can this Court imagine that, if it sanctifies the California court's ploy here, numerous "trade or industrial associations or groups" in addition to the California Bar will not soon crawl out from under the slimy rocks of special-interest politics to evolve, at the hands of pliant state and national legislators, into the species of "public corporations" and "governmental agencies" that the California court says may with impunity force dissenting members to finance their partisan legislative and judicial activism as a condition of doing business? And once such evolution begins, where can it end save with nationwide regimentation of economic and social groups in political and ideological *Sturmabteilungen*—camouflaged, by their protective coloration as "governmental agencies", from constitutional attack by the unfortunate dissidents they have drafted?

## CONCLUSION

The decision of the Supreme Court of California thus raises an issue fundamental to the continuity of republican government in that State and throughout the United States: "Who controls when, why, and how an individual will participate in the legislative and judicial processes through the exercise of his First-Amendment freedoms of speech and petition—the individual himself, or someone else?" And if "someone else", "How can that individual



be imagined to enjoy a freedom of self-determination and self-government?"<sup>42</sup>

It is bootless to pretend that this case can be confined within a narrow domain defined by the limited authority of the Bar—in analogy to the circumscribed privilege of a statutory "exclusive representative" in the labor-relations context to compel financial support solely for its "collective-bargaining" activities.<sup>43</sup> For the Supreme Court of California has unequivocally held that, in the area of legislative and judicial lobbying, the authority of the Bar "should be read broadly", "[w]hatever the subject of the proposed law".<sup>44</sup>

So, either the supposed "governmental" character of the Bar empowers it with a roving commission to enforce political and ideological conformity on its dissident members "[w]hatever the subject of the proposed law"; or the true, residual private nature of the Bar disqualifies it from exercising such pervasive control over those members no matter what official-sounding name the State confers upon it. If the latter, "[t]he very purpose of [the] Bill of Rights" will be served by "withdraw[ing] dissenting lawyers' freedoms of speech and petition] from the vicissitudes of political controversy" and "plac[ing] them beyond the reach of majorities and officials".<sup>45</sup> If the former, the ever-present, ever-ambitious forces of political opportunism

---

<sup>42</sup>See *Board of Educ. v. Barnette*, 319 U.S. 624, 630-31 (1943) (issue one of "self-determination in matters that touch individual opinion and personal attitude").

<sup>43</sup>*Aboud*, 431 U.S. at 232-37 (public sector); *Street*, 367 U.S. at 765-70 (Railway Labor Act); *Communications Workers v. Beck*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 2641, 2648-57 (1988) (National Labor Relations Act).

<sup>44</sup>*Keller*, 767 P.2d at 1030.

<sup>45</sup>*Barnette*, 319 U.S. at 638.

will surely soon exploit the spurious "exception" to the First Amendment the California court has created to begin restructuring the American polity along oppressive corporative-state lines.

It cannot happen here? It already has happened once, in the NIRA of the 1930s! This Court was vigilant then, when the danger was patent and imminent. It must be just as—or perhaps even more—vigilant now, when the danger seems, perhaps, contingent and remote. On mincing steps at first, though, march the great historic tragedies that trample free peoples into subjection to arbitrary power. This Court's duty is to turn those steps away from the path on which the Supreme Court of California has set them.

The decision of the Supreme Court of California must be reversed.

Respectfully submitted,

RAYMOND J. LAJEUNESSE  
National Right to Work  
Legal Defense Foundation  
Suite 600  
8001 Braddock Road  
Springfield, Virginia 22160  
(703) 321-8510

EDWIN VIEIRA, *Counsel of Record*  
13877 Napa Drive  
Independent Hill, Virginia 22111  
(703) 791-6780

Attorneys for *Amicus Curiae*  
National Right to Work  
Legal Defense Foundation

**MOTION FILED**  
**NOV 16 1989**

(5)

No. 88-1905

---

**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1989**

---

**EDDIE KELLER, et al.,**

*Petitioners,*

v.

**STATE BAR OF CALIFORNIA, et al.,**

*Respondents.*

---

**On Writ of Certiorari**  
**to the Supreme Court of California**

---

**MOTION FOR LEAVE TO FILE BRIEF**  
**AMICI CURIAE AND BRIEF AMICI CURIAE**  
**OF THE WASHINGTON LEGAL FOUNDATION**  
**AND THE ATTORNEY GENERAL OF**  
**NEW MEXICO IN SUPPORT OF PETITIONERS**

---

Daniel J. Popeo  
Paul D. Kamenar  
John C. Scully\*  
WASHINGTON LEGAL FOUNDATION  
1705 N Street, N.W.  
Washington, DC 20036  
(202) 857-0240

\*Counsel of Record

November 16, 1989

3944

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

No. 88-1905

---

**EDDIE KELLER, et al.,**  
*Petitioners,*

v.

**STATE BAR OF CALIFORNIA, et al.,**  
*Respondents.*

---

**On Writ of Certiorari  
to the Supreme Court of California**

---

**MOTION OF  
THE WASHINGTON LEGAL FOUNDATION AND  
THE ATTORNEY GENERAL OF NEW MEXICO  
FOR LEAVE TO FILE A BRIEF *AMICI CURIAE***

---

The Washington Legal Foundation (WLF) and the Attorney General of the State of New Mexico hereby move, pursuant to Supreme Court Rule 36, for leave to file the annexed brief *amici curiae* in support of the petitioners in the above captioned proceeding. Consent to filing of this brief was granted by the petitioners but denied by respondents, thus necessitating the filing of this motion.



### INTERESTS OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. Many WLF members and supporters are attorneys living in states, including California, with integrated bar associations and they will be directly affected by this case. In addition, WLF engages in litigation in a variety of areas. WLF devotes a substantial amount of its resources to promoting free speech rights. WLF has appeared in a number of cases involving free speech issues including *Meyer v. Grant* \_\_\_ U.S. \_\_\_, 108 S.Ct. 1886 (1988); *Peel v. Attorney Registration and Disciplinary Commission of Illinois* (Docket # 88-1755); and *Austin v. Michigan State Chamber of Commerce* (Docket #88-1569). In addition, WLF has been active in other issues involving state regulation of legal practice and has participated in the current debate in New York State over whether the Chief Judge of that state should impose a mandatory pro bono requirement as a condition of practicing law.

The Attorney General of New Mexico is the chief law enforcement official of that state. As such, he is concerned with any continuing violation of constitutional rights of citizens of New Mexico -- including lawyers. New Mexico attorneys are not required to support the political and ideological agenda of the new Mexico Bar as a result of the ruling in *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M. 1982). If the California Supreme Court's decision in *Keller v. State Bar*, 767 P.2d 1929 (1989), is upheld, the New Mexico State Bar may attempt to once again force New Mexico attorneys to support political and ideological activities.

Accordingly, *amici* wish to participate in this case and to bring to this Court's attention the impact of this

case beyond California and additional arguments as to why the lower court decision should be reversed.

Respectfully submitted,

Daniel J. Popeo  
Paul D. Kamenar  
John C. Scully \*  
WASHINGTON LEGAL  
FOUNDATION  
1705 N Street, N.W.  
Washington, D.C. 20036  
(202) 857-0240  
*Attorneys for Amici Curiae*

\*Attorney of Record

Date: November 16, 1989

## TABLE OF CONTENTS

	Page
INTERESTS OF <i>AMICI CURIAE</i> . . . . .	1
STATEMENT OF THE CASE . . . . .	2
SUMMARY OF THE ARGUMENT . . . . .	3
ARGUMENT . . . . .	6
I. THE STATE BAR OF CALIFORNIA IS RESTRICTED IN THE MANNER IN WHICH IT CAN USE THE BAR DUES OF OBJECTING ATTORNEYS . . . . .	6
A. The cases dealing with government compelled membership in labor unions provide the model for analyzing this case . . .	6
B. The California State Bar is not the equivalent of a state agency . . . . .	12
C. Even if the State Bar of California is a state agency, it is still limited by the First Amendment in the manner in which it can use compelled fees . . . . .	16
II. THE TEST THIS COURT USES TO DETERMINE WHETHER THE FIRST AMENDMENT IS BEING VIOLATED IS WHETHER THERE IS AN IMPORTANT GOVERNMENTAL INTEREST WHICH JUSTIFIES THE INFRINGEMENT ON SPEECH AND ASSOCIATION . . . . .	18

A. There is no compelling state interest that justifies compelled membership in the State Bar of California . . . . .	19
B. California does not have an interest that justifies compelling financial support for the State Bar for political and ideological activities . . . . .	20
C. The State Bar has the burden of demonstrating that it has a compelling state interest in forcing objecting attorneys to financially support any of the State Bar's activities . . . . .	24
D. Even if the state has a compelling interest in forcing attorneys to financially supporting a state bar, it must tailor the program so that it achieves the goal in a manner the least restrictive on the rights of objecting attorneys . . . . .	26
III. CONCLUSION . . . . .	28

## TABLE OF AUTHORITIES

Page

## Cases:

<i>Aboud v. Detroit Bd. of Education</i> , 431 U.S. 209 (1977) . . . . .	<i>passim</i>
<i>Arrow v. Dow</i> , 544 F.Supp. 458 (D.N.M. 1982) . . . . .	9, 11, 23
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977) . . . . .	17
<i>Brotherhood of Railroad Trainmen v. Virginia</i> , 377 U.S. 1 (1964) . . . . .	17
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) . . . . .	18
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986) . . . . .	<i>passim</i>
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984) . . . . .	10, 11, 19, 21, 25
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) . . . . .	17, 19, 21
<i>Falk v. State Bar of Michigan</i> , 305 N.W.2d 201 (Mich. 1981) [ <i>Falk I</i> ] . . . . .	6, 9
<i>Falk v. State Bar of Michigan</i> , 324 N.W.2d 270 (Mich. 1983) [ <i>Falk II</i> ] . . . . .	7, 10, 23



<i>Galda v. Bloustein</i> , 772 F.2d 1060 (3d Cir. 1985) . . . . .	9
<i>Gibson v. Florida</i> , 798 F.2d 1564 (11th Cir. 1986) . . . . .	10, 23
<i>Hollar v. Government of the Virgin Islands</i> , 857 F.2d 163 (3d Cir. 1988) . . . . .	24
<i>In Re Amendment to Integration of Florida Bar</i> , 439 So.2d 213 (Fla. 1983) . . . . .	23
<i>In Re Primus</i> , 436 U.S. 412 (1978) . . . . .	17
<i>In Re Unification</i> , 248 A.2d 709 (N.H. 1968) . . . . .	6
<i>Keller v. State Bar</i> , 767 P.2d 1929 (Cal. 1989) . . . . .	<i>passim</i>
<i>Koningsberg v. State Bar</i> , 353 U.S. 252 (1957) . . . . .	17
<i>Kusper v. Pontikes</i> , 414 U.S. 51 (1973) . . . . .	19
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961) . . . . .	<i>passim</i>
<i>Levine v. Heffernan</i> , 864 F.2d 457 (7th Cir. 1988) . . . . .	10
<i>Mallard v. United States District Court for the Southern District of Iowa</i> , ___ U.S. ___, 109 S.Ct. 1814 (1989) . . . . .	7

<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958) . . . . .	18
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) . . . . .	17
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963) . . . . .	20
<i>Petition of Chapman</i> , 509 A.2d 753 (N.H. 1986) . . . . .	7, 10, 23
<i>Railway Employees Dept. v. Hanson</i> , 351 U.S. 225 (1956) . . . . .	9
<i>Regan v. Taxation with Representation</i> , 461 U.S. 540 (1983) . . . . .	15
<i>Report of Committee to Review the State Bar</i> , 334 N.W.2d 544 (Wis. 1983) . . . . .	10, 14, 23
<i>Reynolds v. State Bar of Montana</i> , 660 P.2d 581 (Mont. 1983) . . . . .	23, 25
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984) . . . . .	23
<i>Saleeby v. State Bar</i> , 702 P.2d 525 (Cal. 1985) . . . . .	6, 14
<i>Schneider v. Colegio de Abogados de Puerto Rico</i> , 682 F.Supp. 674 (D.P.R. 1988) . . . . .	6, 10, 23, 24, 27
<i>Schware v. Bd. of Bar Examiners</i> , 353 U.S. 232 (1957) . . . . .	17

<i>Scherbert v. Verner</i> , 347 U.S. 398 (1963) . . . . .	17
<i>Thomas v. Review Bd. of Indiana</i> , 450 U.S. 707 (1981) . . . . .	17
<i>United Transportation Union v. Michigan</i> , 401 U.S. 576 (1971) . . . . .	17
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943) . . . . .	10
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977) . . . . .	10, 17
<i>Young Americans for Freedom v. Gorton</i> , 588 P.2d 195 (Wash. 1978) . . . . .	15

#### **Constitutional Provisions:**

U.S. Const. Amend. 1 . . . . .	<i>passim</i>
--------------------------------	---------------

#### **Statutes:**

29 U.S.C. § 151 <i>et seq.</i> . . . . .	20
45 U.S.C. § 151 to 188 . . . . .	56
California State Bar Act, Cal. Bus. & Prof. Code § 6000 <i>et seq.</i> . . . . .	2, 7, 22
1935 Michigan Pub. Acts 58 . . . . .	7
Puerto Rico 43, 4 L.P.R.A. § 711 <i>et seq.</i> . . . . .	7

#### **Rules:**

California Rules of Professional Conduct 3-310 . . . . .	12
Michigan Supreme Court State Bar Rules, Section 1 . . . . .	7
New Mexico S.C.R.A. 1986 24-101 (1989 Repl. Pamph.) . . . . .	7
New Mexico S.C.R.A. 1986 24-102 (1989 Repl. Pamph.) . . . . .	13

#### **Miscellaneous:**

Sorenson, <i>The Integrated Bar and the Freedom of Nonassociation -- Continuing Seige</i> , 63 Neb. L. Rev. 30 (1983) . . . . .	2, 24
--	-------

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

No. 88-1905

---

**EDDIE KELLER, et al.,**  
*Petitioners,*

v.

**STATE BAR OF CALIFORNIA, et al.,**  
*Respondents.*

---

**On Writ of Certiorari  
to the Supreme Court of California**

---

**BRIEF OF  
THE WASHINGTON LEGAL FOUNDATION  
AND THE  
ATTORNEY GENERAL OF NEW MEXICO  
AS AMICI CURIAE  
IN SUPPORT OF PETITIONERS**

---

**INTERESTS OF AMICI CURIAE**

The interests of *amici curiae* are set forth in the preceding motion and are adopted herein.



## STATEMENT OF THE CASE

The California State Bar is an integrated bar, which means that as a condition of practicing law in California, attorneys are required to join and pay dues to the State Bar.<sup>1</sup> The State Bar derives its authority to compel membership and financial support from attorneys pursuant to the State Bar Act (Cal. Bus. & Prof. Code § 6000 *et seq.*).

In 1982, the California State Bar took positions on a number of political and ideological issues such as comparable worth, polygraph tests, possession of armor piercing ammunition, air pollution regulation, sex discrimination, prison construction, a crime victims' bill of rights, the Equal Rights Amendment, and gun control. In support of those positions, the California State Bar spent members' dues to pass resolutions, lobbied the state legislature, and filed *amicus* briefs in court.

In 1982, Keller and 20 additional attorneys, who were licensed to practice law in California and compelled to join and financially support the California State Bar, filed a complaint in the Superior Court of Sacramento seeking a declaration that the State Bar's advancement of a political and ideological agenda with compelled dues violated the objecting attorneys' First Amendment rights.

The trial court granted a motion for summary judgment in favor of the State Bar ruling that the Bar was like a government agency. The court held that as a

---

<sup>1</sup> The problem of compelled bar membership is not limited to California. As of 1982, 32 states had integrated bar associations. Sorenson, *The Integrated Bar and the Freedom of Nonassociation -- Continuing Siege*, 63 Neb. L.Rev. 30, 35 (1983).

government agency, the State Bar was expressing its own views and therefore was not impermissibly compelling the "members" of the agency to support the speech interests of the State Bar. The trial court therefore concluded that the State Bar was not restricted by the First Amendment.

The California Court of Appeals for the Third Appellate District reversed the judgment of the trial court and ruled that the State Bar was both a private and governmental organization. The appellate court held that while the Bar could use compelled dues to finance its governmental functions (admission to the practice of law and attorney discipline), the Bar could not use compelled dues to support its private activities (such as political and ideological activities).

The Supreme Court of California ruled, as did the trial court, that the State Bar was analogous to a government agency and as a government agency it was ment limitations on speech and association. Hence, the

California Supreme Court ruled that the government could compel attorneys to financially support the political and ideological activities of the State Bar.

## SUMMARY OF THE ARGUMENT

The First Amendment to the Constitution protects the right to free speech as well as the right to refrain from compelled speech. It also protects the right to practice law. Integrated bar associations impact upon the First Amendment rights of attorneys by compelling them, as a condition of practicing law, to join bar associations and to pay dues which are used to finance the speech interests of the state bar. The California State Bar is an integrated bar that is essentially the

same as the other integrated bars around the country, including the Wisconsin Bar which was before this Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961).

The California Supreme Court attempted to distinguish the State Bar of California from other integrated bars by painting the State Bar as the equivalent of a state agency. The California Court reasoned that as the equivalent of a state agency, the State Bar could express its own views just as any other state agency can speak. Furthermore, the court argued that the dues of members were more like a tax and the State Bar members could not challenge the use of "tax" money by the state.

The California State Bar is *not*, despite the ruling of the California Supreme Court, the equivalent of a state agency. The California State Bar, while it has some attributes of a government agency, is easily distinguishable from a state agency because it, unlike other state agencies, is composed of "members" and is financed by "dues" rather than by taxes.

The California State Bar, like other integrated state bar associations around the country, is a hybrid organization. State bar associations are primarily private organizations that have the power to compel membership. That power to compel membership is the state action which triggers the First Amendment.

Even if the California State Bar were a state agency, its peculiar status would still require that it be subjected to First Amendment analysis. A state cannot require that individuals support a political or ideological agenda of a state agency as a condition of practicing law, medicine, or any other occupation.

This Court has made the analogy between compulsory support of a labor union and compulsory support of an integrated state bar association in the past. The cases dealing with compulsory agency fees in the public sector and under the Railway Labor Act (45 U.S.C. §§ 151 to 188) provide the proper model for analyzing the constitutionality of the California State Bar's impact upon the First Amendment rights of attorneys.

The petitioners in this case objected to the compulsory support of the political and ideological agenda of the California State Bar. Political and ideological activities are a core speech area of the First Amendment. The State of California has no interest which justifies the infringement upon objecting attorneys' First Amendment rights by compelling those attorneys to financially support the State Bar's advocacy of political or ideological causes. Unlike the situation faced by this Court in *Lathrop*, there is a sufficient record for this Court to rule that attorneys cannot be required to pay for those activities as a condition of practicing law.

Those are not, however, the only areas of integrated state bar activity that potentially infringe upon First Amendment rights. There are many other activities in which integrated bars around the country engage that may also impact upon First Amendment rights of objecting attorneys. While the Court does not have a record before it to do the line-drawing with respect to those activities, it should set the standards for testing the constitutionality of compelled financial support of a state bar in such a manner that the lower courts can have adequate guidance to make those line drawing decisions in the future.

Using the compelled union dues model, this court should hold that dissenting attorneys cannot be com-

pelled to pay for *any* activities unless the state has a compelling interest that justifies the infringement on the objecting attorneys' First Amendment rights. Even if there is a compelling state interest, the government should only be permitted to coerce payment to subsidize those activities if that is the government's least restrictive means of achieving that state interest.

## ARGUMENT

### I. THE STATE BAR OF CALIFORNIA IS RESTRICTED IN THE MANNER IN WHICH IT CAN USE THE BAR DUES OF OBJECTING ATTORNEYS.

#### A. The cases dealing with government compelled membership in labor unions provide the model for analyzing this case.

The State Bar of California is an integrated bar. *Saleeby v. State Bar*, 702 P.2d 525, 529 (Cal. 1985). An integrated bar, or unified bar, is an organization to which all attorneys must join and pay dues as a condition of practicing law in the state. *In Re Unification of New Hampshire Bar*, 248 A.2d 709, 711 (N.H. 1968). Integrated state bars are hybrid organizations that have functions that are sometimes performed by the government and other times are more typical of a private organization. Attorney discipline and licensing of attorneys are examples of regulatory functions of many integrated bars that are often performed by the government. *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F.Supp. 674, 685, n.10 (D.P.R. 1988). Integrated bars often also engage in activities such as pre-paid legal services, lawyer referral services, and lawyer placement services that are non-regulatory or non-governmental in nature. *Falk v. State Bar of*

*Michigan*, 305 N.W.2d 201 (Mich. 1981) [*Falk I*]. Membership in an organization is an example of a facet of an integrated bar that is traditionally associated with a private organization. Finally, many integrated state bar associations engage in political and ideological activities.

The California State Bar engages in diverse activities ranging from the regulation of the admission and discipline of attorneys to lobbying the legislature and filing of *amicus* briefs.<sup>2</sup>

Integrated state bars may vary in detail from state to state, but the essential element that distinguishes a voluntary bar from an integrated bar is that the members of the integrated bar are compelled by the government to join in order to practice law. *Petition of Chapman*, 509 A.2d 753, 756 (N.H. 1986). Sometimes the compulsion is the result of legislative action such as in California, Cal. Bus. & Prof. Code § 6000 *et seq.*, and Puerto Rico 43, 4 L.P.R.A. § 771 *et seq.* It also can be the result of a judicial order as in New Mexico, S.C.R.A. 1986 24-101 (1989 Repl. Pamph.). At other times the compulsion is the result of both statute and a court order as in Michigan 1935 P.A. 58, and Section 1 of the Michigan Supreme Court Rules concerning the State Bar.

---

<sup>2</sup> It is ironic that the California State Bar filed an *amicus* brief, in the last term of this Court, in the case of *Mallard v. United States District Court for the Southern District of Iowa*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1814 (1989). In that brief, the State Bar argued that to require attorneys to accept court ordered appointments to represent indigent individuals on a pro bono basis would be a taking of property in violation of the Fifth Amendment to the United States Constitution. Yet, the Bar fails to recognize that the taking of attorneys' money to finance the Bar's own ideological agenda violates attorneys' First Amendment rights.



The exact source of the authority for compelled membership is irrelevant, as long as the source is the government. Compelled membership is the state action which triggers the protection of the First Amendment to the United States Constitution.

This Court analyzed the impact of compelled association and speech in the context of an integrated bar in *Lathrop*. The Court interpreted the Wisconsin State Bar membership as being limited to compelled financial support. *Lathrop*, 367 U.S. at 827-828, 843. This Court concluded that, to the extent bar membership was limited to financial support, the State of Wisconsin could compel membership in that state bar without impermissibly infringing upon the First Amendment rights of dissenting attorneys.

However, with respect to whether attorneys could be compelled to support the speech interests of the Wisconsin Bar, the Court was not able to reach a majority opinion. As this Court later pointed out in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 n.29 (1977), the only thing concerning compelled speech about which the majority agreed in *Lathrop* was that the constitutional issues should be decided. In the plurality opinion in *Lathrop*, Justice Brennan wrote that because the issue of the constitutionality of compelling financial support for speech activities was not concretely presented to the Court, the Court could not decide that issue.<sup>3</sup> This case presents the concrete record needed

---

<sup>3</sup> A majority of the Court did believe that the issue was ripe for adjudication in *Lathrop* however, there was no majority on the question of whether it was constitutional. Justices Harlan, Whittaker, and Frankfurter, in concurring opinions, did not see any constitutional problems. Justices Black and Douglas, in dissent, (continued...)

by this Court to decide the constitutionality of compelling objecting attorneys to subsidize the speech of integrated state bar associations.

How should integrated bar cases be analyzed? The Court should apply a First Amendment analysis to determine whether the impact of compelled bar dues can be justified. The cases dealing with compulsory fee payments to labor unions in the public sector and under the Railway Labor Act provide the model to analyze this case.

This court has recognized the similarities between integrated state bar associations and labor unions for purposes of First Amendment analysis on several occasions.<sup>4</sup> *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 231 (1956); *Lathrop*, 367 U.S. at 842; *Abood*, 431 U.S. at 233 n.29.

Furthermore, nearly all of the lower courts -- except the trial court and the California Supreme Court in this case -- have used the labor union model to analyze the First Amendment implications of integrated bars. *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982); *Falk v. State Bar of Michigan*, 305 N.W.2d 201 (Mich. 1981) [*Falk I*]; *Falk v. State Bar of Michigan*, 324 N.W.2d

---

<sup>3</sup>(...continued)

held that compelled speech did violate the Constitution. The four member plurality opinion of Brennan held that the issue was not concretely presented so as to permit adjudication of the issue.

<sup>4</sup> At least one circuit has also recognized the utility of the public sector labor model for First Amendment analysis when analyzing the impact upon the First Amendment rights of students required to pay a fee to support an ideological organization as a requirement for attending a state supported university. *Galda v. Bloustein*, 772 F.2d 1060 (1985).

504 (Mich. 1983) [*Falk II*]; *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988); *Petition of Chapman*, 509 A.2d 753 (N.H. 1986); *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988); see *Report of Committee to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983); but see *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988) (dealing only with the right of non-association and not with compelled speech aspect of an integrated bar).

With respect to compelled membership and financial support of a labor union, this Court has held that when an employee is compelled by the government to join a labor union as a condition of employment the First Amendment rights of the employees are implicated. *Abood*; *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

The principle underlying this Court's decisions in those labor union cases is that just as the First Amendment to the Constitution protects the right to freedom of speech and association, it also protects the right to refrain from compelled speech and association. *Abood*, 431 U.S. at 234-235; *Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This Court has concluded that the use of state action to compel financial support of a labor union is a significant infringement upon the First Amendment rights of dissenting employees. *Ellis*, 466 U.S. at 455. The government may only require objecting employees to financially support a labor union if it has an interest which would justify the impact upon the First Amend-

ment rights of the employees. *Abood*, 431 U.S. at 232-233. *Ellis*, 466 U.S. at 455-456.

The similarities between the coerced support for a labor union and the coerced support for a bar association are obvious.<sup>5</sup> The government, in both instances, compels membership in an organization as a condition of employment. Both are supported by compulsory dues. Both engage in speech activities and often that speech involves political and ideological topics. There is no real distinction between coerced union membership and bar membership for purposes of First Amendment analysis. There is nothing about the practice of law which permits the government to treat the First Amendment rights of lawyers differently from those of any other citizens. As one court stated, "the First Amendment does not distinguish between lawyers and other occupations." *Arrow*, 544 F. Supp. at 460.

Compelling attorneys to financially support the political and ideological agenda of the State Bar may also infringe upon the speech interests of the clients of those attorneys. Clients may be paying an attorney to represent them on issues that are diametrically opposed to the Bar's ideological agenda, yet the attorney is financing, through Bar dues, the opposite position.<sup>6</sup>

---

<sup>5</sup> In addition, the same principles would apply to coerced support for other professional associations. Numerous states license a host of occupations ranging from doctors to beauticians. If the California Supreme Court decision is upheld, there is a genuine risk that some states might compel association and financial support for other membership organizations.

<sup>6</sup> A conflict between an attorney's financial support of the State Bar and the attorney's clients may also violate the spirit of the attorney's ethical obligation to avoid conflicts in the representation of his client -- especially if the Bar is filing amicus briefs or  
(continued...)

When the labor union analogy is applied to this case, it is clear that the First and Fourteenth Amendment rights of objecting attorneys are significantly infringed upon when they are required to join and pay dues to a state bar association. Because there is an infringement, traditional First Amendment analysis should be applied to this case.

**B. The California State Bar is not the equivalent of a state agency.**

Although this Court and the lower courts have already recognized the similarities between compelled support for an integrated bar and the compelled support of a labor union for purposes of First Amendment analysis, the California Supreme Court has instead analyzed the California Bar as if it were a government agency.

The California Supreme Court attempted to distinguish the California State Bar from other integrated bars by arguing that the governmental involvement with the California Bar was more pervasive in California. It supported this claim by pointing out that the California State Bar is considered a public corporation, that six members of the Board of Governors are public appointees, that the legislature must approve the Bar's budget, and that the legislature limited the State Bar's political activity. The California Court held that because of that state control over the State Bar, the State Bar should be

analyzed as if it were a government agency rather than as a labor union.<sup>7</sup>

However, the California Bar is not the same as a state agency. The California Supreme Court repeatedly sets up the false dichotomy that the State Bar is either a private organization or a state agency. It failed to recognize that the California State Bar is a hybrid organization that contains elements of both.

The California State Bar is very similar to the Wisconsin Bar that was before this Court in *Lathrop*. Both bar associations engaged in a wide range of activity from attorney discipline to legislation. While the Wisconsin legislature did not approve the budget of the Wisconsin Bar as in California,<sup>8</sup> the Wisconsin government did limit the amount of dues which the bar could require members to pay. *Lathrop*, 367 U.S. at 828 n.5. In many ways, controlling the amount of the Bar's income is the equivalent of controlling the budget.

Also, while the Wisconsin State Bar did not have representatives on its governing board appointed by the

---

<sup>7</sup> Even the California Court, at times, was reluctant to say that the California Bar is a state agency, but instead used terms such as: "the California State Bar is *analogous* to a government agency" *Keller v. State Bar* 767 P.2d 1929, 1027 (1989) (emphasis added); or, "the state bar should be governed by standards *applicable* to a state agency." *Id.* at 1033 (emphasis added); and "The California Bar is best described as *analogous* to a governmental agency." *Id.* 767 P.2d at 1029 (emphasis added).

<sup>8</sup> At least one other state also has governmental control over the budget of the state bar association. In New Mexico, the state bar association budget must be submitted to the Supreme Court of New Mexico. S.C.R.A. 1986 24-102 (1989 Repl. Pamph.).

---

<sup>9</sup>(...continued)  
litigating in a case involving the client. California Rule of Professional Conduct 3-310.



government,<sup>9</sup> as does the State Bar of California, the Wisconsin Supreme Court through the promulgation of rules and regulations was the ultimate source of governance for the Wisconsin Bar.

Furthermore, the public representatives on the Board of the California Bar are a minority, so that fact should not change the nature of the Bar from a private organization to a government agency. As the California Supreme Court pointed out in an earlier case, the California Bar has a "large amount of self government." *Saleeby*, 702 P.2d at 529.

The California Supreme Court also stated that it was significant that the legislature limited the political activity of the bar. Again, that is essentially the same thing that the Wisconsin Supreme Court did when it ordered the integration of the Wisconsin State Bar and limited the Bar's legislative activities to those authorized by the rules and by-laws promulgated by the Wisconsin Supreme Court. The Wisconsin Supreme Court indicated it would use its inherent power to take remedial action should the Wisconsin Bar engage in unauthorized legislative activity. *Lathrop*, 367 U.S. at 845 n.17, 862.

In short, even with respect to those aspects of the California State Bar that the California Supreme Court considered significant for purposes of distinguishing the Bar, the California Bar is very similar to the Wisconsin Bar examined by this Court in *Lathrop*.

---

<sup>9</sup> Since *Lathrop* Wisconsin has discussed having non-lawyer representatives appointed by the Court to the Board's governing body. *Report of the Committee to Review the Bar*, 334 N.W.2d 544 (Wis. 1983).

It is obvious that the California State Bar is not analogous to a state agency. If the California State Bar is a government agency, it does not resemble any other government agency. It would be the only governmental agency that had compelled "members" and would be the only agency financed through compulsory dues rather than tax dollars. Furthermore, since membership in the California Bar is not limited to California voters or even residents of the state, the State Bar would be the only government agency governed, at least in part, by citizens of other states.

That the Bar is financed with dues rather than with taxes is important. This Court, in *Regan v. Taxation with Representation*, 461 U.S. 540, 546 n.7 (1983), distinguished between Congressional subsidy of private speech activities with tax monies and limiting individual expenditures of money on First Amendment activities. By collecting compulsory dues from objecting attorneys to subsidize the State Bar's activities, it deprives attorneys of that money to use for their own speech activities. The only citizens of California that are required to financially support the State Bar are attorneys through the compulsory payments of dues. Dues of "members", not taxes, finance the political and ideological agenda of the California Bar.

The Washington Supreme Court, in *Young Americans for Freedom v. Gorton*, 588 P.2d 195 (Wash. 1978), was faced with the question as to whether the freedom of speech and association rights of the citizens of Washington State were being infringed upon by the filing of an *amicus curiae* brief by the Washington Attorney General in the United States Supreme Court. The plaintiffs in that case attempted to compare their compelled support of the State Attorney General with compelled support for a labor union. Rejecting that

claim, the Washington Supreme Court pointed out that the objectors in that case, "have not been compelled to join any group or organization. They have not been forced to associate with those whom they wish to avoid. *Their voluntary citizenship in a state cannot be equated with compelled membership in a club.*" *Id.* at 220-201 (emphasis added). So also, it is clear that the California State Bar is a compelled membership organization and *cannot* be equated with a State agency.

If the California Supreme Court's claim that the California State Bar is "different" from other state bars is correct, it is a difference without a distinction. The California Bar is essentially like other state bars, including the Wisconsin State Bar this Court examined in *Lathrop*. It is not a state agency, but is a hybrid organization limited by the First Amendment when it uses state action to compel membership.

**C. Even if the State Bar of California is a state agency, it is still limited by the First Amendment in the manner in which it can use compelled fees.**

Even if the State Bar in California is a state agency, that still does not give it carte blanche power to collect compulsory dues to engage in speech activities. The State Bar, like any other state agency, cannot infringe upon the First Amendment rights of attorneys without a compelling state interest that would justify that infringement.

It is well established that the government cannot make the exercise of a right or the receipt of a benefit conditional upon association with a particular ideology. For instance, the government cannot compel an individual to display a state motto on a license plate as a

condition of driving a car. *Wooley v. Maynard*, 430 U.S. 705 (1977). Nor can the state compel support of a political party as a condition of employment in a government job. *Elrod v. Burns*, 427 U.S. 347 (1976). Furthermore, the government cannot, absent a compelling state interest, deny a public benefit because an individual exercised a constitutional right. *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

First Amendment rights also extend to the right to practice law. Litigation is a form of speech and association that is protected by the First Amendment. *In Re Primus*, 436 U.S. 412, 428 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580 (1971); *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963). This is true regardless of the type of litigation pursued. *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3-4 (1964).

Just as the government cannot make an individual choose between the exercise of a right and receipt of a benefit, so also a state cannot condition practice of law upon giving up First Amendment rights. An individual cannot, absent a compelling state interest, be required to relinquish his First Amendment right to speak through advertising in order to practice law. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Nor can an attorney be denied a license to practice law because of the exercise of First Amendment rights. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

If an attorney objects to the speech activities of an integrated bar, compelling the attorney to support those activities would necessarily impact upon the attorney's freedom of speech. California cannot, absent a com-

pellling state interest, condition the practice of law upon the compelled financial support of the political and ideological agenda of the California State Bar.

Membership in the State Bar is required by California in order to practice law. By compelling attorneys to financially support the State Bar as a condition of employment, the government is forcing attorneys to choose between their First Amendment rights of freedom of speech and association and their right to practice law. Hence, even if the California State Bar is analogous to a state agency, it is still subject to the restrictions of the First Amendment.

## II. THE TEST THIS COURT USES TO DETERMINE WHETHER THE FIRST AMENDMENT IS BEING VIOLATED IS WHETHER THERE IS AN IMPORTANT GOVERNMENTAL INTEREST WHICH JUSTIFIES THE INFRINGEMENT ON SPEECH AND ASSOCIATION.

As discussed above, the cases dealing with compelled union dues provide the model to analyze this case. If the labor union analogy is used, a classic First Amendment analysis must be applied. *Hudson*, 475 U.S. at 303 n.11.<sup>10</sup>

The first prong of the First Amendment analysis is whether there is a compelling state interest which justifies the infringement on the First Amendment right of non-association. *Abood*, 431 at 220-224; *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958).

<sup>10</sup> Even if the State Bar is a state agency, the First Amendment analysis is the same.

If there is a state interest that justifies bringing the group together, the second prong is whether the infringement upon the speech interests are any greater than the initial infringement of compelled association. *Ellis*, 466 U.S. at 456 (1984).

Finally, if the infringement is justified by a compelling state interest, the final prong is whether the state has chosen the least restrictive means to implement the program so as to minimize the infringement upon First Amendment rights. *Hudson*, 475 U.S. at 303; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976).

### A. There is no compelling state interest that justifies compelled membership in the State Bar of California.

Does the state of California have a state interest that justifies coerced membership in the State Bar? Even if an association didn't engage in any speech activities, an individual still might object to even joining the organization. *See Abood*, 431 U.S. at 257 (1977) (Powell, J., concurring). The California legislature has set forth a number of specific duties of the State Bar involving the legal profession such as regulation of the admission to practice law and attorney discipline. In addition, the State Bar is empowered by the State to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Keller*, 767 P.2d at 1024.

This Court, in *Lathrop*, held that similar state interests justified compelled association in the Wisconsin state bar. In *Lathrop*, however, this Court interpreted the forced association to be limited to financial support



of the bar. *Lathrop*, 367 U.S. at 827-828, 843. The California Supreme Court did not address, in the decision below, the extent of the forced association required by the California State Bar. It is unclear whether the membership in the California Bar is limited to financial support.

Even if the government has a compelling interest in forcing attorneys to financially support activities such as the regulation of attorney discipline and admissions, compelled membership is not required to carry out those functions. There is no interest that would justify compelled membership -- as opposed to financial support -- in a state bar. The State of California has not demonstrated any legitimate state interest which justifies anything other than -- at the most -- compelled financial support.<sup>11</sup>

**B. California does not have an interest that justifies compelling financial support for the State Bar for political and ideological activities.**

If the government has *any* legitimate interest in compelling support for an integrated state bar, it is limited to compelling financial support for activities such as the regulation of bar admissions and attorney discipline. However, in light of the fact that many states manage to perform the regulatory functions without an integrated state bar, it may be that even those performed by the California Bar no longer justify the impact upon First Amendment rights. *Sorenson*, *supra*

---

<sup>11</sup> In the context of labor relations, this Court has whittled down to its financial core the requirement of "membership" under the National Labor Relations Act. 29 U.S.C. § 151 *et seq.*; *N.L.R.B. v. General Motors Corporation* 373 U.S. 734, 742 (1963).

at 62. If regulation of attorney discipline and admissions are not compelling state interests it is unlikely that the California Bar can compel attorneys to support it for any activities.

Even if there is a compelling state interest that justifies compelled financial support for the regulatory functions of a state bar, this Court must examine whether there are additional infringements upon First Amendment rights beyond that which justify the compelled association for other purposes. *Ellis*, 466 U.S. at 456.

The petitioners in this case objected to having mandatory bar dues used to promote the political and ideological agenda of the State Bar of California. The attorneys specifically objected to the lobbying done by the State Bar, the resolutions passed on public policy issues by the State Bar, and the *amicus curiae* briefs filed by the State Bar. Political and ideological activity represent "the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356 (1976) (plurality opinion).

What state interest is there that can justify impacting upon the core of the First Amendment? As discussed above, the State of California has set forth a number of specific interests involving the regulation of the practice of law. While those limited interests may be sufficient state interests to justify some coerced financial support, they are unrelated to and do not justify the use of compulsory bar dues to support the political and ideological agenda of the State Bar.

The state interest which is used to justify compelled support for the California State Bar's political and ideological speech is the Bar's general goal to "aid in

all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." Cal. Bus. & Prof. Code § 6031 (a). The Bar's general counsel has described this provision as "the springboard of the State Bar activities." *Keller*, 767 P.2d at 1024.

Such a general purpose is too broad to withstand Constitutional scrutiny. All of society has an interest in the improvement in the administration of justice. There is no legitimate state interest which requires that the California State Bar have an "amplified voice" when speaking on such a broad topic.

The California State Bar has interpreted that claimed state interest in a manner that has permitted the Bar to lobby and comment upon a whole host of political issues (such as gun control, welfare reform, and comparable worth). There is no reason to believe that attorneys have any special expertise in those areas. Furthermore, those political issues are, at most, only tangentially related to the "improvement of justice".

There may be some narrow range of issues that the Bar may be uniquely qualified to speak on -- such as the regulation of the admissions and attorney discipline -- and with respect to which the state might, arguably, have some interest which would justify compelled support of the State Bar. That is not, however, the situation in this case. Here the state is claiming an interest in compelling attorneys to financially support a wide range of ideological positions of the State Bar.

Other courts that have looked at the type of broad justification for compelled financial support presented in *Keller* have rejected it. "It is difficult to conceive of an issue presented to the New Mexico Legislature which

cannot arguably be related to the administration of justice or improvement of the legal system. The standard is too broad." *Arrow*, 544 F. Supp. at 462. "One can hardly conceive of loftier goals in a democratic society than creating a strongly pluralistic society and improving the administration of justice. And yet broad statements such as these cannot form the basis for an infringement of First Amendment rights." *Schneider*, 682 F. Supp. at 683. See *Report of the Committee to Review the State Bar* 334 N.W.2d 544 (Wis. 1983). But see *In re Amendment to Integration of Florida Bar*, 439 So.2d 213, 218-214 (1983).

Nearly every court that has looked at the compelled support of integrated bars has held that objecting attorneys cannot be compelled to support political and ideological lobbying of state bar associations. *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982); *Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983); *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988); *Petition of Chapman*, 509 A.2d 753 (N.H. 1986); *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986). See *Report of Committee to Review The State Bar*, 334 N.W.2d 544 (Wis. 1983); but see *In Re Amendment to Integration Rule of the Florida Bar*, 439 So.2d 213 (Fla. 1983); *Falk v. State Bar of Michigan* 342 N.W.2d 504 (Mich. 1983) [Falk II].

Furthermore, permitting the State Bar to force attorneys to financially support the Bar's political and ideological agenda would be in conflict with this Court's holding that an infringement by a compelling state interest can only be justified if it is "unrelated to the suppression of ideas." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Compelled support of a political and ideological agenda is directly related



to the suppression of ideas by taking attorneys' money and using it for political and ideological purposes.

In conclusion, the State of California has demonstrated no interest which justifies infringing upon the core area of attorneys' First Amendment rights.

**C. The State Bar has the burden of demonstrating that it has a compelling state interest in forcing objecting attorneys to financially support any of the State Bar's activities.**

The dissenting attorneys in this case objected to the political and ideological agenda of the California State Bar. However, the First Amendment is not limited to protecting political speech. As the court stated in *Abood*, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a non-exhaustive list of labels -- is not entitled to full First Amendment protection." *Abood*, 431 U.S. at 231 and n.28.

There are expenditures of integrated bar associations, other than those specifically complained of in this case, that may also violate the First Amendment rights of dissenting attorneys. *Sorenson, supra*, at 75-80.

In other states attorneys have objected to other activities of integrated bar associations that impact upon their First Amendment rights. For instance, some of those activities include commercial programs, *Falk*, 305 N.W.2d at 218; publications *Schneider*, 682 F. Supp. at 681; and social activities *Hollar*, 857 F.2d at 170. Litigation can also be a form of ideological activity that implicates First Amendment rights. Even the California Bar's litigation in this case may be an infringement on the First Amendment rights of the plaintiffs. See

*Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983) (Shea, concurring). Other issues not yet litigated also have the potential for impacting upon the First Amendment. One example would be the imposition of a mandatory pro bono program by an integrated state bar.

This Court, due to a lack of factual record on the above list of activities, does not need to do the line drawing as to which, if any, of those activities can be justified. Nevertheless, this Court in its ruling should use a broad test to give guidance to the lower courts if line drawing becomes necessary in future cases.

That test has already been laid out by this Court in the context of the labor union cases. In those cases, this Court has held that the state may have an interest in compelling dues payments in order to require all employees to pay for collective bargaining and contract administration for the labor union which represents the bargaining unit. *Abood*, 431 U.S. at 220-224; *Ellis*, 466 at 447-448. However, there must be a compelling state interest to justify any additional impact upon the speech interests of the objecting non-union workers. This Court has interpreted that limitation to restrict unions to collecting compulsory dues only for those activities related their statutory duty of collective bargaining and contract administration and not for other union activities. *Abood*, 431 U.S. at 235-236; *Ellis*, 466 U.S. at 447-448; *Hudson*, 475 U.S. at 301-302.

How does that translate for purposes of analyzing an integrated state bar? Objecting attorneys, like non-union employees, cannot be compelled to support any activities which impose an additional burden on their speech interests, beyond the burden already imposed by the compelled association, unless the state has a com-



elling interest which would justify that further infringement. Hence, the California State Bar is restricted from compelling financial support not only for the Bar's political and ideological activities, but the Bar is also restricted from compelling financial support for any activities unless the State has a compelling interest which would justify that infringement upon First Amendment rights. The California Bar has the burden of demonstrating that it has an interest that justifies compelling support for any activity that an attorney objects to -- whether that activity is commercial, artistic, social, or charitable.

**D. Even if the state has a compelling interest in forcing attorneys to financially supporting a state bar, it must tailor the program so that it achieves the goal in a manner the least restrictive on the rights of objecting attorneys.**

If California has no compelling interest in coercing attorneys to support the state bar, the state is prohibited from forcing membership and financial support.

However, if the state has an interest that justifies compulsory financial support for the bar, the government must tailor the forced collection of bar dues so that it achieves that end with means which are the least restrictive upon the rights of attorneys. Hence, the dues must be reduced for objecting attorneys to reflect only the attorneys' pro rata share of those limited bar expenditures for which there is a compelling interest in requiring the attorney to pay. Of course, if a state bar is not able to separate chargeable from non-chargeable

expenditures, it cannot collect anything from the objecting attorneys. *Schneider*, 682 F. Supp. at 688 n.14.<sup>12</sup>

Even if a state bar can separate those costs, there must be a procedure to insure that objecting attorneys are not charged for bar expenses beyond which they can be constitutionally compelled to pay. The dissenting and concurring opinion, in *Keller*, dealt briefly with the remedy required for the constitutional violation. That opinion held that the *Hudson* case provides the proper model for collection procedures. At least one other court has also stated that *Hudson* provides the proper model to analyze the collection procedures of an integrated bar. *Schneider*, 682 F. Supp. at 688.

This Court, in *Hudson*, held that as a prerequisite to the collection of fees by a government employer for payment to a labor union, the government and union must provide certain procedural protections to non-union employees in order to minimize the impact the collection will have on the employees' First Amendment rights. Those protections require a labor union to calculate its chargeable expenditures and have those expenditures verified by an independent audit. *Id.* at 307 n.18. The union must provide an advanced reduction of those items that are clearly non-chargeable and escrow of those items that are reasonably subject to dispute. *Id.* at 303-395. Finally, the bar must provide a method for objecting bar dues payers to be able to challenge the amount of the fees before an impartial decision maker. *Id.* at 307.

---

<sup>12</sup> The State Bar should be required to return *all* dues taken from objecting attorneys in the past, since those dues were collected without providing any procedural protections to limit the collection to an amount that could be constitutionally charged to objecting attorneys.

So also, in order to tailor the collection of bar dues so as to minimize the impact upon attorneys' First Amendment rights, integrated state bars must be subject to the same procedures that unions are subject to in the collection of dues. Such procedures are necessary to prevent any infringement upon attorneys' First Amendment rights beyond that necessary to further a compelling state interest.

### III. CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the California Supreme Court on the grounds that compelling financial support for the California State Bar's political and ideological agenda violates the Petitioners' rights to freedom of speech and association guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

Daniel J. Popeo  
Paul D. Kamenar  
John C. Scully \*  
WASHINGTON LEGAL  
FOUNDATION  
1705 N Street, N.W.  
Washington, D.C. 20036  
(202) 857-0240

\*Counsel of Record

Date: November 16, 1989

MOTION FILED  
NOV 16 1989

No. 88-1905

6

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,  
*Petitioners,*

v.

STATE BAR OF CALIFORNIA, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari  
to the California Supreme Court

**MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*  
AND BRIEF FOR THE *AD HOC* COMMITTEE OPPOSING  
LOBBYING AND CERTAIN OTHER ACTIVITIES OF  
A MANDATORY BAR AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

James J. Bierbower  
Bierbower & Bierbower  
1308 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 775-8900

*Counsel of Record for  
Amicus Curiae*

*Of Counsel:*

Larry J. Rector  
Arnold & Porter  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 872-6700  
November 1989

53 144



In The  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1989

---

No. 88-1905

---

EDDIE KELLER; RAYMOND BROSTERHOUS;  
DAN M. KINTER; DAVID LAMPE; GARRETT  
BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A.  
GRODNIER; CHRISTOPHER N. HEARD; LEONARD C.  
HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST;  
DAROLD D. PIEPER; THOMAS HUNTER RUSSELL;  
NANCY L. SWEET; MICHAEL J. WEINBERGER;  
DAVID E. WHITTINGTON; THOMAS R. YANGER;  
WARD A. CAMPBELL; DONALD C. MEANY;  
ASSEMBLYMAN PATRICK J. NOLAN;  
and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE;  
GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.;  
GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H.  
COSTANZO; GEORGE W. COUCH, III; BURKE M.  
CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN;  
RUTH CHURCH GUPTA; DALE E. HANST; LEONARD  
HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP  
SCHAFFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN;  
JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

---

MOTION OF THE *AD HOC* COMMITTEE  
OPPOSING LOBBYING AND CERTAIN OTHER ACTIVITIES  
OF A MANDATORY BAR FOR LEAVE TO FILE A BRIEF  
*AMICUS CURIAE* IN SUPPORT OF PETITIONERS

---

**MOTION FOR LEAVE TO FILE BRIEF OF  
AMICUS CURIAE**

The *Ad Hoc* Committee Opposing Lobbying and Certain Other Activities of a Mandatory Bar [hereinafter Committee] hereby moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petitioners. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

**INTEREST OF AMICUS CURIAE  
AND REASONS FOR GRANTING THE MOTION**

The Committee is a group of attorneys who are members of a mandatory bar. It is composed of attorneys engaged in public service and private practice, formed for the sole purpose of filing the accompanying brief with this Court. Appendix A is a list of the Committee membership.

The Committee believes it can give the Court a different context within which to evaluate the issues raised in the petition for a writ of certiorari. Also, although members of the District of Columbia Bar have achieved a measure of protection through referendum, a favorable decision by this Court would insure and further protect their First Amendment rights.

The Committee has no reason to believe that the facts or questions of law will not be presented adequately by petitioners. However, the Committee believes petitioners will focus their presentation on the issues as they pertain to the State Bar of California. The Committee believes that its brief can add a broader dimension to the facts and questions of law before the Court.

## CONCLUSION

For the foregoing reasons, this motion for leave to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted,

James J. Bierbower  
Bierbower & Bierbower  
1308 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 775-8900

*Counsel of Record for  
Amicus Curiae*

### *Of Counsel:*

Larry J. Rector  
Arnold & Porter  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 872-6700

## APPENDIX A

The affiliations of the members of the Committee are for purposes of identification only and do not necessarily reflect the views of the affiliated entities.

*John P. Arness*, District of Columbia Bar, The Bar Association of the District of Columbia (President 1977-1978). Mr. Arness is a partner in a large Washington, D.C. law firm.

*James J. Bierbower*, District of Columbia Bar (President 1981-1982), The Bar Association of the District of Columbia (President 1978-1979). Mr. Bierbower has held numerous positions within the Bar and has been active in monitoring its activities. Mr. Bierbower is a partner in the Washington, D.C. law firm of Bierbower & Bierbower.

*Anne M. Brennan*, District of Columbia Bar. Ms. Brennan is an Assistant Counsel with the Naval Sea Systems Command.

*Thomas G. Corcoran, Jr.*, District of Columbia Bar. Mr. Corcoran, a former Assistant United States Attorney, was active in the proceedings following the 1980 referendum limiting the use of mandatory dues by the Bar. He is a partner in the District of Columbia law firm of Corcoran, Youngman & Rowe.

*J Leib Dodell*, District of Columbia Bar. Mr. Dodell was recently admitted to the District of Columbia Bar in October 1989. Mr. Dodell, who is familiar with the issues of concern to the *Ad Hoc* Committee as a result of his father's long-term endeavors in this area, is an associate with the Washington, D.C. law firm of Williams & Connolly.

*Nathan Dodell*, District of Columbia Bar. Mr. Dodell has been very active in monitoring Bar activities and has successfully initiated several bar referenda, and has served on Bar Committees. Mr. Dodell is an Assistant United States Attorney.



*John Jude O'Donnell*, District of Columbia Bar (Board of Governors 1981-1984), The Bar Association of the District of Columbia (President 1980-1981, Board of Governors 1976-1982). Mr. O'Donnell has been active in monitoring the activities of the Bar. Mr. O'Donnell is a partner in the Washington, D.C. law firm of Thompson, Larson, McGrail, O'Donnell & Harding.

*A. Patricia Frohman*, District of Columbia Bar (Treasurer 1973-1975), Women's Bar Association of the District of Columbia (President 1963-1964), Bar Association of the District of Columbia (Secretary 1968-1969). Ms. Frohman was Vice Chair (1976-1978) of the Mayor's D.C. Commission on Status of Women. Ms. Frohman is an Assistant United States Attorney.

*Stephen W. Grafman*, District of Columbia Bar. Mr. Grafman, a former Assistant United States Attorney, is a partner in the Washington, D.C. office of a multi-city law firm and is active on a personal basis on behalf of several voluntary legal-related organizations for whom he provides *pro bono* assistance.

*Joseph H. Hairston*, District of Columbia Bar, Washington Bar Association (Treasurer), National Bar Association (Treasurer). Mr. Hairston has served on committees of the District of Columbia Bar and has been very active in monitoring its activities. He is a retired attorney of the United States Department of the Treasury.

*Michael S. Levy*, District of Columbia Bar. Mr. Levy was an Assistant Corporation Counsel in the District of Columbia for ten years handling major litigation involving real estate. For the last ten years he has been engaged in private practice, handling real estate and District of Columbia matters. Mr. Levy is a partner in the District of Columbia law firm of Landis, Cohen, Rauh and Zelenko and a member of the Alcoholic Beverage Control Board of the District of Columbia.

*Lee Loevinger*, District of Columbia Bar, Bar Association of the District of Columbia, Minnesota Bar, Bar Association of Minnesota. Mr. Loevinger has chaired a section of the American Bar Association and held other positions within that organization. Mr. Loevinger has

been an Associate Justice of the Minnesota Supreme Court, Assistant Attorney General in the United States Department of Justice, and a Commissioner of the Federal Communications Commission. Since 1968, Mr. Loevinger has been engaged in the private practice of law. Mr. Loevinger has been active in a variety of bar associations and has maintained an interest in the proper role of bar associations and other professional associations.

*John T. Miller, Jr.*, District of Columbia Bar, Connecticut Bar, United States Supreme Court Bar, Federal Energy Bar Association (President, 1989-1990), American Bar Association (Chairman, Administrative Law Section 1972-1973). Mr. Miller has also served as a Faculty Member of the National Judicial College (1974-1983) and Adjunct Professor of Law at the Georgetown University Law School.

*Bernard I. Nordlinger*, District of Columbia Bar, Bar Association of the District of Columbia (President, 1972-1973). Mr. Nordlinger was Chairman (1979) and a member of the Committee on Admissions and Grievances of the United States District Court for the District of Columbia. Mr. Nordlinger is a Mediator for the United States Court of Appeals for the District of Columbia Circuit and an Evaluator, Early Neutral Evaluation Program, United States District Court for the District of Columbia. He was a founder in 1932, of King & Nordlinger, the Washington, D.C. law firm in which he is a partner.

*Kenneth Wells Parkinson*, District of Columbia Bar. Mr. Parkinson is engaged in the private practice of law in the District of Columbia.

*Larry J. Rector*, District of Columbia Bar. Mr. Rector has published an article which discusses use of dues by a mandatory bar<sup>1</sup> and he has been active in monitoring the activities of the Nebraska State Bar Association. Mr. Rector is an associate with the Washington, D.C. law firm of Arnold & Porter.

<sup>1</sup> See Special Project, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 Neb. L. Rev. 762 (1987).

*James P. Riley*, District of Columbia Bar. Mr. Riley is a member of several voluntary bar associations. He has monitored activities of the Bar, and took an active role in the proceedings following the 1980 referendum limiting the use of mandatory dues by the Bar. Mr. Riley is a partner in the Washington, D.C. law firm of Fletcher, Heald & Hildreth.

*Arthur B. Spitzer*, District of Columbia Bar (Member, Steering Committee Section 4 (Courts, Lawyers and the Administration of Justice)). Mr. Spitzer is the Legal Director of the American Civil Liberties Union of the National Capital Area.

*Jacob A. Stein*, District of Columbia Bar (President, 1982-1983), Bar Association of the District of Columbia (President, 1982-1983), Maryland Bar. Mr. Stein is an Adjunct Professor of Law at George Washington University (1984- ) and Georgetown University Law School (1985- ). He is the author of several books and articles on various legal subjects. Mr. Stein is a trial lawyer in the District of Columbia.

*Stephen A. Trimble*, District of Columbia Bar (Board of Governors, 1978-1981), Bar Association of the District of Columbia (President, 1976-1977). As a Governor, Mr. Trimble cautioned against the Board of Governors taking political positions that might be opposed by members holding different views. He is a partner in the District of Columbia law firm of Hamilton and Hamilton.

*Bruce J. Terris*, District of Columbia Bar. Mr. Terris, a former Assistant to the Solicitor General (1958-1965), is in the private practice of law specializing in environmental and employee rights cases. He was actively involved in a campaign involving one referendum of the Bar.

In The  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1989

No. 88-1905

EDDIE KELLER; RAYMOND BROSTERHOUS;  
DAN M. KINTER; DAVID LAMPE; GARRETT  
BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A.  
GRODNIER; CHRISTOPHER N. HEARD; LEONARD C.  
HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST;  
DAROLD D. PIEPER; THOMAS HUNTER RUSSELL;  
NANCY L. SWEET; MICHAEL J. WEINBERGER;  
DAVID E. WHITTINGTON; THOMAS R. YANGER;  
WARD A. CAMPBELL; DONALD C. MEANY;  
ASSEMBLYMAN PATRICK J. NOLAN;  
and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation;  
ANTHONY M. MURRAY; PATRICIA GREENE;  
GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.;  
GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H.  
COSTANZO; GEORGE W. COUCH, III; BURKE M.  
CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN;  
RUTH CHURCH GUPTA; DALE E. HANST; LEONARD  
HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP  
SCHAFFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN;  
JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

BRIEF OF THE *AD HOC* COMMITTEE OPPOSING  
LOBBYING AND CERTAIN OTHER ACTIVITIES OF  
A MANDATORY BAR AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS

## TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE

BRIEF OF *AMICUS CURIAE*

BRIEF OF *AMICUS CURIAE*

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 2

I. LEGISLATIVE AND LOBBYING ACTIVITIES  
BY A MANDATORY BAR VIOLATE THE FIRST  
AMENDMENT ..... 2

A. Mandatory Bar Activities Must Further  
Compelling State Interests and Must  
Be Scrupulously Tailored To Promote  
Those Interests Through The Least  
Restrictive Means ..... 3

B. A Mandatory Bar's Lobbying Activities  
and Compelled Financial Support of  
Such Activities Violate The First  
Amendment Rights of Its Members Who  
Oppose Such Activities ..... 6

C. The Experience of The District  
of Columbia Bar ..... 12

II. THE APPROPRIATE REMEDY IS AN INJUNCTION  
PROHIBITING A MANDATORY BAR FROM  
ENGAGING IN ACTIVITIES THAT FAIL  
CONSTITUTIONAL SCRUTINY ..... 16

CONCLUSION ..... 19



## TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209, <i>reh'g denied</i> , 433 U.S. 915 (1977) .....	<i>passim</i>
<i>Angarano v. United States</i> , 329 A.2d 453 (D.C. 1974) ( <i>en banc</i> ) .....	12
<i>Arrow v. Dow</i> , 544 F. Supp. 458 (D.N.M. 1982) .....	7
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986) .....	17
<i>Ellis v. Brotherhood of Railway, Airline and Steamship Clerks</i> , 466 U.S. 435 (1984) .....	17
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....	9
<i>Falk v. State Bar of Michigan</i> , 418 Mich. 270, 342 N.W.2d 504 (1983) .....	8
<i>Gibson v. Florida Bar</i> , 798 F.2d 1564 (11th Cir. 1986) .....	7,8
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773, <i>reh'g denied</i> , 423 U.S. 886 (1975) .....	12
<i>Goldfarb v. Virginia State Bar</i> , 419 U.S. 1103, <i>reconsideration denied</i> , 420 U.S. 944 (1975) .....	12
<i>Hollar v. Government of Virgin Islands</i> , 857 F.2d 163 (3d Cir. 1988) .....	7
<i>In re Petition of Chapman</i> , 128 N.H. 24, 509 A.2d 753 (1986) .....	7
<i>In re Unified New Hampshire Bar</i> , 112 N.H. 204, 291 A.2d 600 (1972) (Grimes, J., dissenting) .....	13

<u>Cases:</u>	<u>Page</u>
<i>Keller v. State Bar of California</i> , 255 Cal. Rptr. 542, 767 P.2d 1020 (Cal.), <i>cert. granted</i> , 110 S. Ct. 46 (1989) .....	<i>passim</i>
<i>Keller v. State Bar of California</i> , 181 Cal. App. 3d 471, 226 Cal. Rptr. 448 (1986), <i>rev'd</i> , 255 Cal. Rptr. 542, 767 P.2d 1020 (Cal.), <i>cert. granted</i> , 110 S. Ct. 46 (1989) .....	10
<i>Lathrop v. Donohue</i> , 367 U.S. 820, <i>reh'g denied</i> , 368 U.S. 871 (1961) .....	<i>passim</i>
<i>Levine v. Heffernan</i> , 864 F.2d 457 (7th Cir. 1988), <i>cert. denied</i> , 110 S. Ct. 204 (1989) .....	7
<i>NLRB v. Textile Workers Local 1029</i> , 409 U.S. 213 (1972) .....	3
<i>On Petition to Amend Rule I of the Rules Governing the Bar</i> , 431 A.2d 521 (D.C. 1981) .....	16
<i>Railway Employees' Dep't v. Hanson</i> , 351 U.S. 225, <i>reh'g denied</i> , 352 U.S. 859 (1956) .....	7
<i>Romany v. Colegio de Abogados de Puerto Rico</i> , 742 F.2d 32 (1st Cir. 1984) .....	7
<i>Schneider v. State</i> , 308 U.S. 147 (1939) .....	11
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960) .....	10
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972) .....	11
<i>Supreme Court of New Hampshire v. Piper</i> , 470 U.S. 274 (1985) .....	6
<i>Tashjian v. Republican Party</i> , 479 U.S. 208 (1986) .....	11

<u>Cases:</u>	<u>Page</u>
<i>United States v. Cummings</i> , 301 A.2d 229 (D.C. 1973) .....	12
<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989) .....	4
<i>West Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	4
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977) .....	4,8
<u>Constitutions:</u>	<u>Page</u>
U.S. Const. Amend. I .....	<i>passim</i>
U.S. Const. Amend. XIV .....	2
<u>Statutes:</u>	<u>Page</u>
Cal. Bus. & Prof. Code § 6031(a) (West Supp. 1989) .....	3
<u>Miscellaneous:</u>	<u>Page</u>
Admin. Order No. 1985-1, 420 Mich. <i>lviii</i> (1984) .....	17
<i>Bar Business Referendum Results</i> , District Lawyer (Fall 1976) .....	14
<i>Bar Organization Act</i> , 4 J. Am. Judicature Soc. 111 (1920) .....	3
I. Brant, <i>James Madison: The Nationalist</i> (1948) .....	2
Cal. Auditor Gen. Rep. P-605, <i>Results of the Plebiscite of Members of the</i> <i>State Bar of California</i> (1986) .....	11

<u>Miscellaneous:</u>	<u>Page</u>
Letter from Robert N. Weiner to D.C. Bar Members (Oct. 13, 1989) .....	15
<i>Model Bar Organization Act</i> , 10 J. Am. Judicature Soc. 110 (1926) .....	3
Nebraska State Bar Association, <i>Report of Special Committee on NSBA Policy</i> <i>on Legislation</i> (1987) .....	16,17
Rules of the District of Columbia Court of Appeals Governing the Bar of the District of Columbia, Rule II, Section I .....	12
T. Schneyer, <i>The Incoherence of the Unified</i> <i>Bar Concept: Generalizing from the Wisconsin</i> <i>Case</i> (American Bar Foundation 1983) .....	9,17
Special Project, <i>Compelled Financial Support</i> <i>of a Bar Association and the Attorney's</i> <i>First Amendment Rights: A Theoretical</i> <i>Analysis</i> , 66 Neb. L. Rev. 762 (1987) .....	3,17
L. Tribe, <i>American Constitutional Law</i> (2d ed. 1988) .....	9

**BRIEF OF THE *AD HOC* COMMITTEE OPPOSING  
LOBBYING AND CERTAIN OTHER ACTIVITIES BY A  
MANDATORY BAR AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONERS**

---

**INTEREST OF *AMICUS CURIAE***

This *amicus curiae* brief is filed contingent on the granting of the foregoing motion for leave of Court to file said brief. The interest of *amicus curiae* is set forth in that motion.

**SUMMARY OF ARGUMENT**

When a mandatory bar engages in legislative and lobbying activities the First Amendment is violated. This conclusion is inescapable. There are no compelling state interests that are furthered by such activities that cannot also be furthered through means less restrictive to the rights of dissenting bar members. Mandatory bar membership is, in itself, an infringement on the rights of bar association members. This restriction, however, has been found to be justified by compelling state interests. Additional restrictions on the rights of bar members should not be countenanced by this Court especially when, as in the case of legislative and lobbying activities, the activity fails to further any compelling state interests.

Moreover, when a lawyer is compelled to finance such activity the First Amendment rights of the lawyer are also violated. The remedy for these constitutional deprivations is an injunction prohibiting a mandatory bar from undertaking activities which fail to further compelling state interests.



## ARGUMENT

### I. LEGISLATIVE AND LOBBYING ACTIVITIES BY A MANDATORY BAR VIOLATE THE FIRST AMENDMENT

The First and Fourteenth Amendments to the United States Constitution guarantee that no state shall abridge the freedoms of speech and association. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."<sup>1</sup> As this two century-old quote from perhaps the foremost authority on the Constitution and First Amendment illustrates, this issue addresses the very concerns that prompted the drafting of the Constitution. The First Amendment was drafted to protect the people from tyranny of government. This Court should return to these fundamental principles in resolving this issue.

Over the past seventy-five years the compulsion inherent in the mandatory bar has been a major concern to the profession and continues to be the subject of heated debate. A mandatory bar is an association that all attorneys must join as a condition to the granting of a license to practice law. Many states and the District of Columbia have mandatory bars. One characteristic common to most is the requirement that members pay annual dues to the association to support its activities. Mandatory bars are involved in many activities that range both in scope and purpose. For example, mandatory bars oversee many aspects of the profession including admission, discipline and prevention of the unauthorized practice of law. The bar provides educational programs for its members and the public. In addition, many bars lobby their state legislatures on issues that may impact upon the bar, the lawyer, and the profession.<sup>2</sup> For example, several mandatory bars have been involved in tort

<sup>1</sup> Thomas Jefferson (1779) (quoted in I. Brant, *James Madison: The Nationalist* 354 (1948)).

<sup>2</sup> While many bar members object to more than simply the legislative and lobbying activities of a mandatory bar, it is recognized that this is not the case to challenge those additional activities. The issues presented and the record before the Court involve only the legislative and lobbying activities of the State Bar of California.

reform and other issues that affect the economic interests of their members.

The State Bar of California is authorized under state law to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice . . . ." Cal. Bus. & Prof. Code § 6031(a) (West Supp. 1989). This broad authority has been incorporated in most statutes and court rules integrating the nation's mandatory bars.<sup>3</sup> The authorizations in many states were patterned after various Model Bar Organization Acts containing "administration of justice and advancement of jurisprudence" language.<sup>4</sup> Thus, the decision of this Court will have a direct and immediate impact on almost every mandatory bar in this country.

#### A. Mandatory Bar Activities Must Further Compelling State Interests and Must Be Scrupulously Tailored To Promote Those Interests Through The Least Restrictive Means

Any analysis of this issue must start with the premise that the First Amendment protects one against compelled association. This was noted by Justice Douglas in *NLRB v. Textile Workers Local 1029*, 409 U.S. 213, 216 (1972), wherein he referred to "the law which normally is reflected in our free institutions — the right of the individual to join or to resign from associations, as he sees fit . . . ."

<sup>3</sup> See Special Project, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 Neb. L. Rev. 762, 791-92 n.124 (1987) ("One may think that looking to the legislation or court rule establishing the integrated bar would be an appropriate place to begin this analysis, but most integrated bar rules and statutes are worded in very broad and general terms. The typical language is 'the advancement of the science of jurisprudence and the effective administration of justice.'").

<sup>4</sup> See, e.g., *Bar Organization Act*, 4 J. Am. Judicature Soc. 111-14 (1920); *Model Bar Organization Act*, 10 J. Am. Judicature Soc. 110-12 (1926).

Furthermore, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943). An individual has the right not to be made "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715.<sup>5</sup>

The current challenge involves the State Bar of California and its expenditure of membership dues in a manner inconsistent with its dissenting members' beliefs. The mandatory bar dues in this case were used by the "State Bar of California to finance lobbying, amicus curiae briefs and other activities, including election campaign activities . . ." *Keller v. State Bar of California*, 255 Cal. Rptr. 542, 543, 767 P.2d 1020, 1021, (Cal.) cert. granted, 110 S. Ct. 46 (1989).

The California Supreme Court held that the State Bar of California resembles a governmental agency and thus "the bar may use dues to finance all activities germane to its statutory purpose, a phrase [the court construed] broadly to permit the bar to comment generally upon proposed legislation or pending litigation." *Keller*, 255 Cal. Rptr. at 544, 767 P.2d at 1022. The only activity which the California Supreme Court prohibited was the bar's involvement in election campaigns. *Id.*

The entire analysis of the California Supreme Court in the instant case is premised on its conclusion that the State Bar of California is a governmental agency. That conclusion, however, fails to give any significance to the unique structure of a bar association which has aspects resembling both a governmental agency and a private association. This was noted in a cogent dissent.

<sup>5</sup> In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), the Third Circuit sustained the Beef Promotion and Research Act of 1985 against a First Amendment challenge. The Act required cattle producers to help finance, through compelled assessments, the beef industry's advertising. The court held that the First Amendment speech and association rights of cattle producers were not abridged. Regardless of the merit of the reasoning of the Third Circuit in that case, it has no bearing on this case. The messages being disseminated here are unrelated to the governmental interest justifying bar membership.

[The majority's] error is grounded in [its] failure to recognize the significance of a crucial fact: The California State Bar derives its funds from membership dues which all attorneys, and only attorneys, in California are required by law to pay as a condition precedent to pursuing their livelihood — the practice of law — in the state. It is this fact — compelled membership in a professional association with mandatory dues as a condition to practice the profession of law — that subjects the State Bar to the constitutional scrutiny from which most other governmental agencies may be exempt.

*Id.* at 556, 767 P.2d at 1034 (Kaufman, J., concurring in part and dissenting in part).

The California Supreme Court's reasoning fails close analysis because while it may be true that a bar association is analogous to a governmental agency for some purposes, *i.e.*, attorney registration, discipline, and client security, there are many other activities which the bar association has undertaken that are more analogous to a labor union. The Committee does not question the authority of a mandatory bar to expend bar dues to further its governmental functions. However, activities such as lobbying and certain other activities do not further compelling state interests. In addition, the mandatory bars influence legislatures and courts to adopt particular points of view that may or may not further the special interests of the Bar and its membership.

Indeed, the composition, organization and operation of a mandatory bar association is much akin to a labor union. Thus, in evaluating the constitutionality of its activities the Court should look to *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, *reh'g denied*, 433 U.S. 915 (1977) and its progeny. As discussed below, the principles announced in *Abood* require a reversal of this case. Consistent with *Abood*, a mandatory bar should be limited to only activities that



further compelling state interests and those activities must be narrowly tailored to avoid any unnecessary infringement on First Amendment rights.

B. A Mandatory Bar's Lobbying Activities  
and Compelled Financial Support of  
Such Activities Violate The First  
Amendment Rights of Its Members Who  
Oppose Such Activities

In *Lathrop v. Donohue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961), this Court held that a state may require an attorney to become a member and pay reasonable annual dues to a mandatory bar in order to practice law within the state. This was the first case in which this Court dealt with the constitutional challenge to a mandatory bar. *Lathrop* was heralded by some as putting an end to the challenges against the mandatory bar. It has been recognized, however, that *Lathrop* did not decide the scope of permissible mandatory bar activities and whether an attorney can be forced to provide financial support for mandatory bar activities with which he disagrees. *Id.* at 847-48.

Writing for a plurality, Justice Brennan concluded that *Lathrop's* argument was essentially one of freedom of association.<sup>6</sup> "[A]ppellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation." *Id.* at 827. The plurality responded that *Lathrop* was not being forced to associate with anyone and the only compulsion to which he was subjected was the payment of the fifteen dollars in annual dues. Thus, *Lathrop* discussed but did not decide the scope of permissible mandatory bar activity and whether a mandatory bar could compel dues for activities with which some of its members disagreed.

<sup>6</sup> Also implicated in this issue is the right to pursue one's livelihood. This Court has recognized that the right to practice law is a fundamental right. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985).

In *Lathrop* this Court relied on *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, *reh'g denied*, 352 U.S. 859 (1956), wherein it held that the Railway Labor Act "did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments." *Lathrop*, 367 U.S. at 842. In *Railway Employees'* the Court stated that "[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238. Justice Douglas, author of *Railway Employees'*, however, later retracted this statement. *Lathrop*, 367 U.S. at 879 (Douglas, J., dissenting).<sup>7</sup>

Accordingly, this Court has historically linked the fate of the mandatory bar to its decisions in the labor union context.<sup>8</sup> A number of post-*Lathrop* decisions of this Court which have addressed such a challenge in the labor context provide additional guidance to the issue in the context of a mandatory bar. For example, in *Abood*, 431 U.S. at 234, this Court held that a union cannot use "required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." Moreover, in *Abood* the union had to limit its use of compelled fees to causes that were germane to its duties as collective

<sup>7</sup> In light of subsequent decisions, the dissents of Justices Black and Douglas have correctly foreshadowed the development of the law on compulsory membership. See, e.g., *Abood*.

<sup>8</sup> Several federal and state cases have continued to apply this Court's decisions in the labor union context when resolving the issues that are now before the Court. See, e.g., *Hollar v. Government of Virgin Islands*, 857 F.2d 163 (3d Cir. 1988); *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989); *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984); *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982); *In re Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (1986).



bargaining representative. *Abood* reaffirmed the established principle that the government cannot compel a person to belong to an organization for the purpose of spreading a political message.<sup>9</sup>

The result in *Abood* compels a conclusion by this Court that a mandatory bar may not engage in activities for purposes unrelated to the compelling state interests warranting mandatory membership; for example, for the purpose of spreading a political message. Moreover, the mandatory bar certainly cannot assess dues to be used to finance such impermissible activities. In the years since *Abood*, several state and federal courts have reached this conclusion.<sup>10</sup>

Indeed, the argument for restricting the permissible activities and use of compelled assessments in the context of a mandatory bar is even greater than in the context of a labor union. The labor union context involves compelled financial support of a union's activity which furthers the principles of exclusive union representation and the efficient contract negotiation which underlie the federal labor laws. The federal labor policies which are furthered by union shop and agency shop agreements are compelling state interests which this Court has determined justify any resulting encroachment on the First Amendment rights of dissenters. *Abood*, 431 U.S. at 220.<sup>11</sup> In contrast, in the context of the mandatory bar there is no strong policy which is furthered by having the bar "speak with one voice." Also, in the labor union context, compulsory financial support is necessary to protect the collective bargaining rights of all employees. There is no analogue in the mandatory bar context. Finally, because bar membership is mandatory, the Bar's position will always be attributed to its membership. Such is not always the case in the labor union context. Thus, there is less justification for the infringement on the First Amendment rights of attorneys than there is on dissenters in the labor union context.

<sup>9</sup> This principle is derived, in part, from this Court's decision in *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), which dealt with the "First Amendment right to avoid becoming the courier for [the message of the state]."

<sup>10</sup> See generally *Gibson*, 798 F.2d at 1569; *Falk v. State Bar of Michigan*, 418 Mich. 270, 342 N.W. 2d 504 (1983).

<sup>11</sup> The issue in *Abood* involved an "agency shop" arrangement which required every employee represented by a union, even though not a union member, to pay a service charge equal in amount to the union dues. *Abood*, 431 U.S. at 211.

As previously noted, because the First Amendment rights of freedom of speech and association are fundamental rights any governmental intrusion upon these rights can be justified only by a compelling state interest. *Elrod v. Burns*, 427 U.S. 347 (1976); see generally L. Tribe, *American Constitutional Law* 977-86 (2d ed. 1988). It is clear since *Lathrop* that there are compelling state interests which justify compelled membership in a mandatory bar. Thus, this case is not a case concerning compelled membership *per se*.<sup>12</sup>

The compelling state interests underlying mandatory bar membership include the regulation and discipline of attorneys and the protection of the clients whom they serve.<sup>13</sup> There are, however, no compelling state interests which justify a mandatory bar's undertaking legislative lobbying and other purely political activities or the use of mandatory bar dues for such activities over objection by dissenting bar members. The bar's interest in these activities cannot justify the intrusion upon its members' First Amendment rights. While there may be a legitimate state interest in receiving comment from attorneys on issues germane to the role of attorneys in society, this state interest is not compelling when there are several voluntary bar associations which fulfill this need. In fact, voluntary bar associations are often in a better position to serve this need because they possess specialized knowledge in particular fields of law.<sup>14</sup>

Thus, not only are voluntary bar associations arguably more capable of informing legislators and courts on specific issues, but they are also the least restrictive alternative available. The practice of

<sup>12</sup> One scholar has suggested that the concept of a mandatory bar may still be unconstitutional in its entirety even after *Lathrop*. See T. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case* (American Bar Foundation 1983). Noting that this Court did not decide whether mandatory bar dues could be spent over a dissenting member's objection, Schneyer argues — in light of this challenge and the existing associational infringements — this Court, when considering both challenges, may still conclude that the mandatory bar is unconstitutional. *Id.* at 67.

<sup>13</sup> However, as discussed below, compelled membership in a bar may not be the least restrictive means of furthering these compelling state interests.

<sup>14</sup> Even in a mandatory bar, Sections supported by voluntary dues can serve this need, as has been demonstrated by the District of Columbia experience. See *infra* note 29 and accompanying text.

law since *Lathrop* was decided has evolved into very specialized activity. Lawyers in today's society often find it necessary to confine their practices to specialized fields in order to serve their clients.<sup>15</sup> With this reality in mind it should also be recognized that a mandatory bar will not be able to take a position that reflects the views of all of its members, many of whom may be specializing in practices that are at odds with one another.

As this Court has often noted, even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In this regard, the significance of the voluntary bar associations simply cannot be overstated.

A mandatory bar is simply a convenient way to administer the state's compelling interest in regulating attorneys. Another less restrictive alternative to further a state's compelling interests in regulating attorneys would be for the state to establish an independent governmental agency with exclusive jurisdiction over attorneys licensed by the state. By taking this authority away from a mandatory bar and making membership voluntary the bar would be free to engage in any activity that it desires. Further, the state agency would be immune from constitutional challenges if it limited its activities to those furthering its compelling interests in regulating attorneys.

The California Supreme Court rejected the Court of Appeals decision which would have required the State Bar of California to determine whether contemplated activity was germane to the purposes justifying mandatory membership and whether the state interest in the activity was sufficient to justify the additional infringement on a dissenter's First Amendment rights.<sup>16</sup> The California Supreme Court's decision regarded this requirement as an "extraordinary burden" which the "bar has neither the time nor money to undertake . . . ." *Keller*, 255 Cal. Rptr. at 550, 767 P.2d

<sup>15</sup> This specialization is partially attributable to the vast body of specialized state and federal codes and regulations.

<sup>16</sup> *Keller v. State Bar of California*, 181 Cal. App. 3d 471, 226 Cal. Rptr. 448 (1986), *rev'd*, 255 Cal. Rptr. 542, 767 P.2d 1020 (Cal.), *cert. granted*, 110 S. Ct. 46 (1989).

at 1028. Curiously, the California Supreme Court seemed to balance fundamental First Amendment rights against the burden the state would suffer in preventing a violation of such fundamental rights.

Indeed, this Court has held in several cases that the avoidance of an administrative burden is not a compelling reason justifying infringement on First Amendment rights. *See, e.g., Tashjian v. Republican Party*, 479 U.S. 208, 217-18 (1986) (possibility of increases in the cost of administering the election system is not a sufficient basis for infringing First Amendment rights); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, . . . that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.") (footnote omitted); *Schneider v. State*, 308 U.S. 147, 162-63 (1939).

Thus, in rejecting the analysis of the Court of Appeals the California Supreme Court has disregarded this Court's great body of constitutional jurisprudence which requires a compelling state interest, as opposed to administrative convenience, to justify a state's infringement on First Amendment rights.

The anomaly inherent in this issue is that many mandatory bars, in furtherance of educating the public about the principles embodied in the Constitution often do so at the expense of the First Amendment rights of their own members. The State Bar of California, in promoting its legislative and lobbying agenda, has acted with indifference to its 115,000 members. *Keller*, 255 Cal. Rptr. at 564 n.8, 767 P.2d at 1042 n.8 (Kaufman, J., concurring in part and dissenting in part).

Finally, while the Committee does not suggest that constitutional issues should be decided by acclamation, it may be useful for purposes of understanding the significance of this issue to review the results of a poll of the membership of the State Bar of California conducted by the State of California.<sup>17</sup> This poll

<sup>17</sup> Cal. Auditor Gen. Rep. P-605, *Results of the Plebiscite of Members of the State Bar of California* (1986). The results of the California Poll boasted a 44% response rate from more than 100,000 attorneys polled. Over 60% of the respondents favored a limitation of the legislative activities that were funded with mandatory bar dues. *Id.* An independent poll of Nebraska lawyers resulted in a pattern of responses that closely resembled the results of the California survey.



revealed that a very significant portion of the State Bar of California membership objects to the use to which their dues are put.<sup>18</sup> This highlights the fact that this issue is not an academic exercise but rather is an issue that concerns a large number of lawyers.

C. The Experience of The District of Columbia Bar

Since 1972, lawyers practicing in the District of Columbia have been required to join the District of Columbia Bar.<sup>19</sup> The District of Columbia Bar [hereinafter Bar] has been active in a wide variety of programs. In the Bar's early years, the Board of Governors [hereinafter Board] filed *amicus curiae* briefs<sup>20</sup> and made recommendations on legislation,<sup>21</sup> in both instances purporting to act on behalf of the Bar membership. For example, the Board opposed a business privilege gross receipts tax and advocated a nonresident income tax. The Board also took positions on proposed legislation, *inter alia*, concerning consumer protection and police complaint machinery.

<sup>18</sup> The California Supreme Court noted that all of the activities of which petitioners have complained were financed primarily from membership dues. *Keller*, 255 Cal. Rptr. at 544, 767 P.2d at 1022.

<sup>19</sup> Rules of the District of Columbia Court of Appeals Governing the Bar of the District of Columbia, Rule II, Section 1.

<sup>20</sup> In two instances, the Board filed motions for leave to file *amicus curiae* briefs with the District of Columbia Court of Appeals. See *Angarano v. United States*, 329 A.2d 453, 455 (D.C. 1974) (en banc); *United States v. Cummings*, 301 A.2d 229, 233 (D.C. 1973). In these cases the court accepted the briefs with some reservations but alluded to the serious constitutional issues presented by the Board's filing such briefs. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975), the District of Columbia Bar sought to file an *amicus* brief with this Court urging that lawyers are subject to the antitrust laws. Leave to file was denied. See *Goldfarb v. Virginia State Bar*, 419 U.S. 1103, *reconsideration denied*, 420 U.S. 944 (1975).

<sup>21</sup> Pursuant to the Bar's Rules, the seven-member Executive Committee could determine the position of the Bar on legislation when the Executive Committee deemed expedited consideration necessary.

The Board, however, did not restrict its expression of positions on public issues to *amicus* briefs and proposals for legislation. For example, two days after the event, the Board adopted a resolution condemning President Gerald Ford's pardon of former President Richard Nixon and the Executive Committee also issued a statement criticizing the dismissal of Archibald Cox during the Watergate events.

Some members of the Bar were concerned about the wide range of actions the Board was taking. These members were not so much concerned with the particular positions advocated by the Bar, rather, they were opposed to the Bar taking a position on matters unrelated to its authority over the membership. Indeed, several Bar members who objected to the Bar's activities noted that the need for oversight of the Bar is especially great as to matters relating to the administration of justice because such matters may have a more immediate impact on lawyers.<sup>22</sup> These concerned members noted that compulsory membership in a bar association is an exception to the principle that people ordinarily have the right to resign from an organization, *i.e.*, "to vote with their feet." Therefore, it was maintained that there must be a compelling state interest to justify activities of a mandatory bar and that no such interest warranted the Board's filing of *amicus* briefs and making recommendations on legislation. In a 1976 referendum, brought about by a petition of the Bar membership, the members voted to restrict the Board's authority. After this referendum, the Board was limited to making recommendations on proposed legislation and filing *amicus* briefs

<sup>22</sup> This fact was noted by Justice Grimes of the New Hampshire Supreme Court when he stated:

Many lawyers find this compulsory membership offensive and the effect upon their personal liberty is not diminished because the causes are 'confined to issues related to the particular interests and competence of lawyers.' These issues can and do engender as deep feelings as any others.

*In re Unified New Hampshire Bar*, 112 N.H. 204, 207-08, 291 A.2d 600, 602 (1972) (Grimes, J., dissenting).



only on "matters closely and directly related to the administration of justice."<sup>23</sup> In addition, such recommendations could be made only after a referendum or meeting of the Bar membership on specific issues.<sup>24</sup>

At a general membership meeting of the mandatory Bar in 1979, a motion was adopted recommending that the Board urge ratification of the proposed District of Columbia voting rights amendment to the United States Constitution. Some members questioned whether this recommendation was authorized by the 1976 referendum. The Board decided that the proposal was "closely and directly related to the administration of justice."<sup>25</sup>

Thus, even after the 1976 referendum limiting the Board's authority to take positions on legislation and the filing of *amicus* briefs, the Board can take action on these issues if the action is approved by a vote of the Bar membership.

Nevertheless, as a result of the 1976 referendum, the threat to the Bar members' First Amendment rights in the District of Columbia is less than in California. The Committee, however considers the District of Columbia experience relevant to the issue now before the Court. In addition, there are three scenarios in which the decision of this Court may still have a significant impact on members of the District of Columbia Bar.

*First*, although the 1976 referendum limits many activities which may be undertaken by the mandatory Bar, the Board may still take positions on behalf of the Bar if the positions do not involve legislation or *amicus* briefs. For example, the Board could seemingly issue a press release stating the Bar's position on a particular issue or event.

*Second*, the 1976 referendum does not prevent the Board from taking positions on legislation and filing *amicus* briefs if authorized

<sup>23</sup> *Bar Business Referendum Results*, District Lawyer 45 (Fall 1976).

<sup>24</sup> *Id.* The Bar membership rejected a proposal that would have completely prohibited the Board of Governors from filing *amicus* briefs or taking positions on legislation.

<sup>25</sup> Also, in 1979, the Board of Governors submitted a referendum proposal to restore part of its lost authority to make recommendations on legislation. The members of the Bar rejected the Board's proposal.

by a vote of the membership on a specific issue by referendum or at a meeting.<sup>26</sup> Thus, the constitutional issue is still presented — the inability to disassociate oneself from the positions with which one disagrees — even when a vote of the membership favors taking a position.

*Third*, in the event the 1976 referendum were repealed or modified by the Bar membership, a favorable decision from this Court would protect members' rights as a matter of constitutional law.

In proposing the 1976 referendum many Bar members advocated authorizing the Bar's Divisions, now called and hereinafter referred to as Sections, to file *amicus* briefs and make recommendations on legislation.<sup>27</sup> This option was favored by many because the Sections are voluntary, have special familiarity and expertise in particular subject matters, and the free exchange of ideas would be promoted because Sections could take differing positions. Indeed, the Sections have been granted this authority.<sup>28</sup> For many years the Sections have been supported by voluntary membership fees and under this arrangement the Sections have been thriving.<sup>29</sup> They are acting with great autonomy and vigor providing service to the public and to the Bar, as well as providing professional

<sup>26</sup> As noted, among the members of the Committee there are those who have had long and close contact with the Board. Often there has been expression of relief by members of the Board at not having to be burdened by lengthy agendas reviewing numerous legislative proposals.

<sup>27</sup> The Bar has 21 Sections open to both members and nonmembers involved in various activities which advance their specialized interests.

<sup>28</sup> The Sections must make clear that they are not presenting the views of the Bar when they take positions on various issues and they cannot take positions on political issues. Nevertheless, some members oppose Sections taking positions because the views of a Section might be taken to be those of the Bar despite any disclaimer.

<sup>29</sup> In a recent letter sent to the Bar membership urging participation in the Bar's Sections it was noted that "[t]he Sections are the largest and most active segment of the Bar. . . . Individual Sections have also submitted comments and provided forum for debate on timely issues within their expertise . . . ." Letter from Robert N. Weiner to D.C. Bar Members (Oct. 13, 1989).

satisfaction to their membership.<sup>30</sup>

Events similar to those involving the District of Columbia Bar have been taking place throughout the country in many states with mandatory bars. For example, in response to an independent poll of Nebraska lawyers on this issue, the Nebraska State Bar Association [hereinafter NSBA] appointed a committee to study the NSBA's use of mandatory bar dues.<sup>31</sup> The committee, which is referred to as the Sennett Committee, concluded that "it is fair to say that in light of the authorities listed above, the Nebraska State Bar Association would have a very difficult time defending its current lobbying practices." *Sennett Committee Report* at 5 (the authorities referred to were precedents established by this Court).

These events in the District of Columbia and Nebraska, among others, underscore the significant impact that this Court's decision will have on members of mandatory bars throughout the nation.

## II. THE APPROPRIATE REMEDY IS AN INJUNCTION PROHIBITING A MANDATORY BAR FROM ENGAGING IN ACTIVITIES THAT FAIL CONSTITUTIONAL SCRUTINY

The State Bar of California should be enjoined from undertaking activities that fail to further compelling state interests and that are not narrowly tailored to reduce the infringement on the First Amendment rights of its membership. Moreover, the State Bar of California should be restricted from using mandatory dues to support political and ideological activities unrelated to its role as the primary regulator of California attorneys.

<sup>30</sup> We note in the interest of completeness that members of the District of Columbia Bar, by referendum in 1980, limited the use that can be made of mandatory dues to admission, registration, discipline and a client security fund. The District of Columbia Court of Appeals permitted the referendum to take effect with some modification. *On Petition to Amend Rule 1 of the Rules Governing the Bar*, 431 A.2d 521 (D.C. 1981). A 1988 referendum to repeal or modify the 1980 referendum was defeated. The 1980 referendum does not limit Bar activities which are self-sustaining or supported by voluntary fees or contributions.

<sup>31</sup> Nebraska State Bar Association, *Report of Special Committee on NSBA Policy on Legislation* (1987) [hereinafter *Sennett Committee Report*].

In the labor union context, this Court has approved several variations of a dues checkoff to remedy a labor union's use of compelled dues for improper purposes.<sup>32</sup> This remedy is simply inadequate in the context of a mandatory bar because — as already noted — positions taken by a mandatory bar will still be attributed to its entire membership regardless of whether a dissenter has chosen not to support a particular position. Furthermore, the opinion of a majority or even all of a mandatory bar's Board of Governors cannot rationally be said to be the opinion of the majority of the members who are compelled to belong. Thus, as long as a mandatory bar uses the power of the state to compel membership it must also abide by the constitutional limitations on this coercive power.

Accordingly, the First Amendment is violated even by the taking of a position by a mandatory bar without actually appropriating money to advocate the position. The mandatory bar misses the point of its dissenting members' objections when it proposes dues checkoff procedures in tandem with a policy allowing continued legislative and lobbying activities. It is generally not only the fact that a small portion of the regular dues assessment will be used for lobbying that offends dissenters; it is this plus the fact that the bar's official positions will be imputed to the dissenters.<sup>33</sup>

This analysis illustrates that the remedy often employed in the labor union context fails to cure the underlying constitutional violations in the context of a mandatory bar.<sup>34</sup> Although voluntary *Abood*-type remedies have been implemented by many mandatory bars,<sup>35</sup> these remedies are clearly inadequate. It is for this reason

<sup>32</sup> See, e.g., *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984).

<sup>33</sup> See generally *Schneyer*, *supra* note 12 at 63-64.

<sup>34</sup> In *Abood*, as well as the other decisions in the labor union context, this Court did not have the option of prohibiting the objectionable activity because to do so would have infringed upon the First Amendment rights of the union members who voluntarily have associated themselves with the union.

<sup>35</sup> For example, Michigan has adopted an *Abood*-type procedure. Admin. Order No. 1985-1, 420 Mich. 1viii (1984). In addition, the NSBA has adopted its Sennett Committee's recommendations. For a thorough discussion of the inadequacies of the remedy proposed by the Sennett Committee Report, see *Special Project*, *supra* note 3, at 803-05.



that if this Court reverses the California Supreme Court and holds that a mandatory bar cannot use compelled dues for lobbying activities the Court should also address the proper remedy.

When a constitutional violation is involved, allowing the activity to continue is simply not an option. An injunction must issue to enjoin the unconstitutional activity. A checkoff arrangement is inadequate because it allows the mandatory bar to continue the activity which has been found unconstitutional. Furthermore, returning an objecting bar member's *pro rata* share of dues found to be used for impermissible activities does not redress the constitutional violation.

In other contexts it would never be suggested that the government may continue unconstitutional activities if it simply "buys out" those that object to the activity. Such a result should not be reached in this case. Since the impermissible use of compelled dues is neither justified nor cured under a checkoff system, such procedures are nothing more than a perpetual system of violations and possible repayments. Thus, the fundamental constitutional infirmity is never removed.

This Court should hold that a mandatory bar's lobbying activities and the compelled financial support of such activities violate the First Amendment. There are no compelling state interests which justify these activities.<sup>36</sup> Although legitimate state interests are implicated, these state interests are met through the widespread involvement of voluntary bar associations. Moreover, there are less restrictive alternatives available to the state to further its compelling interests. Accordingly, this Court should hold that the State Bar of California may not engage in legislative lobbying activities.

<sup>36</sup> Alternatively, given the range of practical solutions, this Court should hold that the California Supreme Court failed to adequately consider alternatives which are less restrictive on First Amendment rights. Accordingly, this Court should vacate the judgment of the California Supreme Court and remand this case so that it can consider the practical alternatives to the mandatory bar's legislative lobbying and compelled financial support of such lobbying. As noted, voluntary Bar Sections in the District of Columbia have proven to be a workable solution to this problem.

## CONCLUSION

For the foregoing reasons this Court should reverse the judgment of the California Supreme Court.

Respectfully submitted,

James J. Bierbower  
Bierbower & Bierbower  
1308 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 775-8900

*Counsel of Record for  
Amicus Curiae*

*Of Counsel:*

Larry J. Rector  
Arnold & Porter  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 872-6700



MOTION FILED

NOV 15 1989

No. 88-1905

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,

*Petitioners,*

—v.—

STATE BAR OF CALIFORNIA, *et al.*,

*Respondents.*

ON WRIT OF *CERTIORARI* TO THE CALIFORNIA SUPREME COURT

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS*  
*CURIAE* AND BRIEF *AMICUS CURIAE*  
OF THE AMERICAN CIVIL LIBERTIES UNION  
IN SUPPORT OF PETITIONERS**

Steven R. Shapiro  
(*Counsel of Record*)  
John A. Powell  
American Civil Liberties Union  
Foundation  
132 West 43 Street  
New York, New York 10036  
(212) 944-9800

No. 88-1905

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

---

EDDIE KELLER, *et al.*,

*Petitioners,*

-v.-

STATE BAR OF CALIFORNIA, *et al.*,

*Respondents.*

---

ON WRIT OF *CERTIORARI* TO THE CALIFORNIA  
SUPREME COURT

---

MOTION OF THE AMERICAN CIVIL LIBERTIES  
UNION FOR LEAVE TO FILE  
*BRIEF AMICUS CURIAE*

---

The American Civil Liberties Union (ACLU) respectfully moves for leave to file the annexed brief as *amicus curiae* in this case. Petitioners have consented to the filing of the brief; respondents have refused to give their consent.

The ACLU is a nationwide, nonpartisan organization with approximately 275,000 members dedicated to the principles of liberty and equality embodied in the Consti-

tution and civil rights laws. Since its founding nearly 70 years ago, the ACLU has been particularly concerned with any abridgement of First Amendment freedoms. The ACLU has, therefore, appeared before this Court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*.

The issue before the Court is the extent to which lawyers in California can be compelled to subsidize ideological activities they do not support as a condition of practicing law within the state. Because that issue raises constitutional questions of fundamental importance to the ACLU, we respectfully seek leave to submit this *amicus curiae* brief for the Court's consideration.

Respectfully submitted,

*Steven R. Shapiro*

Steven R. Shapiro  
(Counsel of Record)  
John A. Powell  
American Civil Liberties Union  
Foundation  
132 West 43 Street  
New York, NY 10036  
(212) 944-9800

Dated: November 15, 1989

## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS</i> .....	1
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
I.    GOVERNMENT COMPELLED SUPPORT FOR IDEOLOGICAL CAUSES IS INCONSISTENT WITH CORE FIRST AMEND- MENT VALUES .....	5
II.   A STATE-IMPOSED SYSTEM OF MANDATORY DUES MUST BE NARROWLY DRAWN TO SERVE A COMPELLING STATE INTEREST .....	8
III.  THE DECISION BELOW PERMITS EXPENDITURES THAT GO FAR BEYOND ANYTHING ALLOWED BY THIS COURT IN <i>ABOOD</i> .....	12
CONCLUSION .....	18



# TABLE OF AUTHORITIES

	<i>Page</i>
<b>Cases</b>	
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977) . . . . .	<i>passim</i>
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980) . . . . .	16
<i>Brotherhood of Clerks v. Allen</i> , 373 U.S. 113 (1963) . . . . .	9, 10
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) . . . . .	7
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986) . . . . .	10
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984) . . . . .	10, 17
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) . . . . .	16
<i>International Association of Machinists v. Street</i> , 367 U.S. 740 (1961) . . . . .	9, 10, 13, 14
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967) . . . . .	16
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961) . . . . .	4, 13, 14, 15
<i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241 (1974) . . . . .	6
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958) . . . . .	7
<i>New York State Club Ass'n v. City of New York</i> , 487 U.S. ___, 108 S.Ct. 2225 (1988) . . . . .	15

	<i>Page</i>
<i>Pacific Gas &amp; Electric Co. v. Public Utilities Comm.</i> , 475 U.S. 1 (1986) . . . . .	6
<i>Railway Employees' Dep't v. Hanson</i> , 351 U.S. 225 (1956) . . . . .	8, 9, 13, 14, 15
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984) . . . . .	17
<i>Roe v. Wade</i> , 410 U.S. 113 (1973) . . . . .	4
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958) . . . . .	6
<i>Tashjian v. Republican Party</i> , 479 U.S. 208 (1986) . . . . .	7
<i>Texas v. Johnson</i> , 491 U.S. ___, 109 S.Ct. 2533 (1989) . . . . .	16
<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961) . . . . .	6
<i>Village of Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980) . . . . .	7
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943) . . . . .	6
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977) . . . . .	6, 7

## Statutes and Regulations

Cal. Bus. & Prof. Code §6000, <i>et seq.</i> . . . . .	1
Railway Labor Act, 45 U.S.C. §152, Eleventh . . . . .	8

## INTEREST OF *AMICUS*

The interest of the ACLU is set forth in the accompanying motion for leave to file this *amicus curiae* brief.

## STATEMENT OF THE CASE

This case began when 21 members of the California State Bar challenged the use of their mandatory dues to finance what they regard as political and ideological activities of the State Bar. As framed, the issue is a narrow one. Petitioners do not ask this Court to rule that integrated bars are *per se* unconstitutional. Nor do they challenge the use of their mandatory dues to support the State Bar's many non-ideological functions.

California established its integrated bar in 1927.<sup>1</sup> Like many bar associations around the country, it performs a variety of functions. *See generally*, Cal. Bus. & Prof. Code, §6000, *et seq.* Some of those functions involve explicitly delegated duties. For example, the California State Bar is empowered by statute to receive and investigate complaints of professional misconduct. §§6043 and 6076. It administers the annual bar examination. §6046. And it arbitrates fee disputes between lawyers and clients. §§6200-6206.

Other activities are not delineated by statute. Most significantly, the State Bar supports litigation and legislation through the filing of *amicus* briefs and the hiring of lobbyists. These efforts are undertaken pursuant to the State Bar's general mandate to "aid in all matters pertaining to the . . . administration of justice . . . ." §6031.

---

<sup>1</sup> This description of the California State Bar is derived from the decision below. *Keller v. The State Bar of California*, 767 P.2d 1020, 1023-25 (1989).

The meaning of that mandate in specific contexts is determined by a Board of Governors, which ultimately decides what briefs to file and what legislation to support in the name of the State Bar.<sup>2</sup>

Upon reviewing this statutory scheme, the California Supreme Court declared that the State Bar was "a government agency" in all its aspects and, as such, "may use [its] dues for any purpose within its statutory authority." 767 P.2d at 1030. The court further concluded that the bar's statutory authority should "be read broadly" to include the expression of opinion on virtually any legal matter. *Id.* As explained by the majority below:

Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with needed expertise, whose collective advice can lead to significant improvements in the legislative proposal.

*Id.*

Relying on this virtually boundless notion of legal expertise, the California Supreme Court rejected petitioners' claim that certain activities of the State Bar are so ideologically tinged, and so far afield from its core purpose, that they cannot be supported by mandatory dues. With regard to lobbying, in particular, the court noted:

[E]ven if the proposed bill seems at first glance to relate entirely to substantive matters unrelated to the practice of law, the advice of expert practitioners could still be crucial.

---

<sup>2</sup> The Board of Governors consists of 22 members. Sixteen are elected by constituent groups within the State Bar. The remaining six are appointed by the Governor of California and approved by the State Senate. 767 P.2d at 1024.

*Id.* at 1031.

Given this broad approach, the California Supreme Court never considered any of the specific instances of allegedly ideological activity identified by petitioners, such as the use of mandatory bar dues to support a ballot initiative favoring a nuclear freeze. See Cert.Pet. at 3. Instead, the court held that a "bill-by-bill, case-by-case, review of bar lobbying and *amicus* briefs is unnecessary and unworkable." 767 P.2d at 1031.<sup>3</sup>

This Court has taken a different approach in the union and agency shop cases discussed more fully below. Moreover, as the California Supreme Court candidly acknowledged, "most of the cases from other jurisdictions which have addressed the subject of integrated bar dues have applied the labor union analogy to the bar." 767 P.2d at 1038 (and cases cited therein).

### SUMMARY OF ARGUMENT

The principle that individuals may not be compelled to provide their financial support to ideological causes they do not share is deeply embedded in our nation's constitutional heritage. It is reflected in the writings of the framers and the holdings of this Court.

That principle is obviously not absolute. Government can and does impose its taxes without regard to whether every citizen endorses every program paid for by every tax dollar. But this Court has never confused the prerogatives of the state with the permissible author-

---

<sup>3</sup> The decision below does hold that the State Bar may not engage in election campaigning. 767 P.2d at 1032-33. So far as the California Supreme Court was concerned, however, that issue turned on the scope of the State Bar's statutory authority rather than the source of its financial support. *Id.*



ity of private associations supported by governmentally compelled contributions.

The issue has most often arisen in the context of union and agency shops, where this Court has consistently ruled that mandatory dues are only permissible if their use is "germane" to the union's core purpose of collective bargaining. *E.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). There is no persuasive reason why mandatory bar dues should be treated any differently.

Certainly, the problem of compelled support for ideological causes does not disappear merely by designating the California State Bar a "government agency." It may well be true that, under California law, the bar is acting as an agent of the state when it regulates the admission and discipline of lawyers. But it seems equally plain that the State Bar's decision to file *amicus* briefs or lobby the Legislature cannot fairly be characterized as a government function.

This is not to suggest that the "free rider" principle articulated in *Abood* and elsewhere translates exactly to integrated bars. Integrated bars are not unions and they do not engage in collective bargaining on behalf of their members. Nevertheless, the broader lesson of the union cases is that any expenditure of mandatory dues must be closely related to the same compelling interests that initially justify their mandatory collection.

Judged by that standard, the decision below is fatally overbroad. For example, it would apparently permit the use of mandatory dues to pay for a brief by the State Bar on the continuing vitality of *Roe v. Wade*, 410 U.S. 113 (1973). While enormously important, that issue simply is not "germane" to the core purposes of an integrated bar, *see Lathrop v. Donohue*, 367 U.S. 820 (1961), and lawyers in California should not be compelled to support such activity on pain of losing their professional license.

We urge this Court to go no further in deciding this case. In particular, we express no opinion on whether mandatory dues can be used to support ideological activity that is more closely tied to the administration of justice -- like the advisability of a compulsory *pro bono* requirement -- or whether mandatory dues should instead be limited to the bar's self-policing function. This record does not present those questions clearly, and they should not be decided prematurely.

## ARGUMENT

### I. GOVERNMENT COMPELLED SUPPORT FOR IDEOLOGICAL CAUSES IS INCONSISTENT WITH CORE FIRST AMENDMENT VALUES

"[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977).

That principle lies deep within this nation's constitutional heritage. Thus, in *Abood*, this Court quoted with approval from James Madison's defense of religious liberty:

Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

*Id.* at 234 n.31. Thomas Jefferson agreed, writing that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.*

This Court has never wavered from that view, which

is reflected in at least three distinct strands of modern constitutional law. Most fundamentally, this Court has consistently held that the right of free speech protected by the First Amendment implies a correlative right to refrain from speaking in compelled support of a state-ordained political or religious orthodoxy.

No one has expressed that principle more eloquently than Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943):

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Numerous other cases, however, make the same point. For example, *Torcaso v. Watkins*, 367 U.S. 488 (1961), holds that notaries public may not be required to affirm their belief in God. *Speiser v. Randall*, 357 U.S. 513 (1958), holds that a property tax exemption may not be conditioned on the taxpayer's willingness to declare his political loyalty. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), holds that a newspaper may not be compelled to print the reply of a political candidate who has been criticized in the newspaper's pages. And *Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1 (1986), holds that public utilities may not be forced to include opposing views on ratemaking issues in their billing envelopes.

The unifying theme in all these cases was aptly summarized in *Wooley v. Maynard*, 430 U.S. 705 (1977), when this Court struck down a New Hampshire statute requiring all noncommercial licenses to display the state slogan, "Live Free or Die."

We begin with the proposition that the right of freedom of thought protected by the First

Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

*Id.* at 714 (citations omitted).

The "broader concept" of individual freedom mentioned in *Wooley* is also reflected in this Court's recognition that the right of association guaranteed by the First Amendment is both a sword and a shield. On the one hand, the state may not prevent individuals from associating in pursuit of a common political goal. *E.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958). On the other hand, the state may not limit or prescribe the membership of political association. *Cf. Tashjian v. Republican Party*, 479 U.S. 208 (1986).

Finally, this Court has held in a series of cases dealing with union and agency shops that individuals may not be compelled to subsidize political causes they do not espouse. *See* Point II, *infra*. Political contributions combine elements of both speech, *see Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and association, *see Buckley v. Valeo*, 424 U.S. 1 (1976). And, like speech and association, political contributions are constitutionally protected in both an affirmative and negative sense. Accordingly, "[t]he fact that [petitioners] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Aboud*, 431 U.S. at 234 (footnote omitted).



## II. A STATE-IMPOSED SYSTEM OF MANDATORY DUES MUST BE NARROWLY DRAWN TO SERVE A COMPELLING STATE INTEREST

The issue of mandatory dues is hardly a new one for this Court. To the contrary, the Court has considered the question at least six different times since 1956. Each of these cases arose in a union context, as the majority below is careful to point out. However, each of these cases also placed significant restraints on the manner in which mandatory dues can be spent. Those restraints reflect a sensitivity to constitutional values that is almost entirely missing from the decision below.

The earliest cases from this Court focused on a provision of the Railway Labor Act, which authorized negotiated union shops notwithstanding the contrary right-to-work laws of "any State." See 45 U.S.C. §152, Eleventh. This provision was subject to a facial challenge under the Commerce Clause in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956). The Court rejected that challenge, stating: "The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one." *Id.* at 233.

The Court nevertheless acknowledged that serious First Amendment problems might be presented by a more fully developed record.

[I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on §2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the

Commerce Clause . . . .

*Id.* at 238.

Five years later, in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), a new set of plaintiffs came back to this Court claiming that compulsory union dues were in fact being used to subsidize political activity. The Court sustained plaintiffs' claim without ever reaching the First Amendment issue. Instead, the Court held that the use of mandatory dues for political purposes violated congressional intent. Specifically, the Court concluded that the union shop provisions of the Railway Labor Act were adopted by Congress "for the limited purpose of eliminating the problems created by the 'free rider,'" *id.* at 767, and that this "limited purpose" also determined the manner in which mandatory dues could be spent.

The dividing line articulated in *Street* was further refined in *Brotherhood of Clerks v. Allen*, 373 U.S. 113 (1963). The plaintiffs in that case challenged a series of union expenditures, including the use of mandatory dues to support the union's death benefit plan and its legislative lobbying program. Although the Court reached no final judgment on the propriety of these expenditures under the Railway Labor Act, it stressed that the "necessary predicate for [any remedy] is a division of the union's political expenditures from those germane to collective bargaining." *Id.* at 121.

The requirement that expenditures be "germane" to collective bargaining, if supported by mandatory dues, was constitutionalized in *Abood v. Detroit Board of Education*. The plaintiffs in *Abood* challenged a provision of Michigan law that authorized public employee unions to negotiate agency shop agreements. As in *Hanson*, the Court upheld the concept of an agency shop based on the "legislative assessment" that they make "an important contribution . . . to the system of labor relations . . . ."



431 U.S. at 222. But as in *Street* and *Allen*, the Court ruled that the underlying purposes of the agency shop also determined the use of mandatory dues.

In drawing this First Amendment line, the Court carefully noted that it was not restricting the union's political activities, but only the source of its funding. As the Court explained:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

431 U.S. at 235-36 (footnote omitted).

Since *Abood*, the Court has returned to the issue of mandatory dues two additional times. In *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), the Court held, in part, that objecting employees could not be charged with the cost of any litigation unrelated to the bargaining unit. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986), the Court stressed that any remedial scheme adopted in response to *Abood* "must be carefully tailored to minimize the infringement" of First Amendment rights.

In considering the issue of mandatory bar dues, the California Supreme Court did not even make a pretense of following *Abood*.<sup>4</sup> Instead, it concluded that *Abood*

---

<sup>4</sup> Throughout the remainder of this brief, *Abood* is used as a short-  
(continued...)

was legally irrelevant to the California State Bar, which it analogized to a government agency entitled to spend its funds on any and all activities within the general scope of its statutory mandate, 767 P.2d at 1030.

That judgment is inconsistent with the decision of every other court to address the question of mandatory bar dues after *Abood*.<sup>5</sup> It is also unpersuasive on its face. It may well be that the California State Bar acts as an agent of the state when it administers the bar examination and investigates complaints of professional misconduct. It clearly does not operate as an agent of the state when it files *amicus* briefs with the California courts or lobbies the California legislature on matters of importance to the legal profession.<sup>6</sup>

Contrary to the view of the California Supreme Court, this dual role does not make *Abood* less important; if anything, it makes it more important precisely because it increases the risk that the State Bar's mandatory dues will be used to fund its private political activities as well as its quasi-governmental functions.

Furthermore, to the extent that mandatory dues are used to fund the State Bar's political activities, those dues cannot be compared to the general tax revenues

---

<sup>4</sup> (...continued)

hand reference to the entire line of cases from this Court dealing with the issue of mandatory dues.

<sup>5</sup> These decisions are collected in the dissenting opinion below. 765 P.2d at 1038-39.

<sup>6</sup> The divided nature of the State Bar is reflected in its Board of Governors. Six are political appointees; the remaining sixteen are elected by members of the bar. See n.2, *supra*. That ratio would be an unusual one, at best, if the State Bar were truly a government agency rather than a private association performing certain governmental functions.

collected and spent by most government agencies. As Justice Powell observed in his concurring opinion in *Abood*:

Compelled support of a private association is fundamentally different than compelled support of government . . . [T]he reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

431 U.S. at 259 n.13.

In urging application of the *Abood* standard to the facts of this case, we do not mean to suggest that the California State Bar or, for that matter, other integrated bars around the country, are the functional equivalent of trade unions. Obviously, there are both similarities and differences. In contrast to the California Supreme Court, however, we believe that the *Abood* test is fully capable of taking into account the public functions and broader purposes of the State Bar in determining the permissible use of mandatory dues. The mistake of the court below was in assuming that the bar's public functions are adequate justification for ignoring *Abood* entirely.

### III. THE DECISION BELOW PERMITS EXPENDITURES THAT GO FAR BEYOND ANYTHING ALLOWED BY THIS COURT IN *ABOOD*

After *Abood*, a state-imposed system of mandatory dues is only permissible to the extent that it promotes an important state interest. Any benefit to the association's

political or ideological goals must be incidental and secondary. Conversely, the state may not play a role in compelling the payment of mandatory dues if the use of those dues primarily serves the association's political or ideological agenda. Otherwise, the state would be impinging on matters of individual conscience in violation of the First Amendment.

In the union context, this Court has identified two state interests that justify legislative support for a system of mandatory dues. First, the Court has deferred to legislative findings that union and agency shops help to promote industrial peace. Second, the Court has recognized that the so-called "free rider" problem raises issues of equality and fairness that the state has a legitimate interest in addressing.

Because the California Supreme Court eschewed reliance on *Abood*, it never sought to examine the state interests supporting an integrated bar nor the relationship of those interests to the use of mandatory bar dues. This Court, however, began that examination almost thirty years ago.

On the very same day that *Street* was decided, the Court rejected a broad constitutional challenge to Wisconsin's integrated bar in *Lathrop v. Donohue*, 367 U.S. 820 (1961). At the same time, the Court expressly reserved decision on the narrower question presented by this case: namely, whether mandatory dues may constitutionally be used to support the ideological activities of an integrated bar. *Id.* at 845.

In both method and result, the decision in *Lathrop* closely resembles the decision in *Hanson*, on which it heavily relies. Like *Hanson*, the decision in *Lathrop* begins by reciting the important state interests served by



an integrated bar.<sup>7</sup> And like *Hanson*, the decision in *Lathrop* ends by concluding that these important state interests can properly be financed through a state-imposed system of mandatory dues.<sup>8</sup>

The existence of this nexus, however, is central to both rulings. As Justice Brennan explained for the *Lathrop* plurality:

We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

367 U.S. at 843.

By distinguishing between the bar's "regulatory program" and its "legislative activity" *Lathrop* foreshadows *Abood*, just as *Hanson* and *Street* did in the union context. Certainly, nothing in *Lathrop* is inconsistent with *Abood*'s holding that a private association may not use state-imposed dues to coerce the support of dissenting members for political or ideological goals which they do not share, and in which the state itself has no direct interest.<sup>9</sup>

---

<sup>7</sup> These activities included the handling of grievances, legal training, and public education. *Lathrop*, 367 U.S. at 839-42.

<sup>8</sup> The majority below refers to Justice Harlan's concurring opinion in *Lathrop* as support for the proposition that the activities of an integrated bar can be compared to the activities of a state commission. 767 P.2d at 1029 n.16. But in expressing those views, Justice Harlan spoke only for himself and Justice Frankfurter. 367 U.S. at 848.

<sup>9</sup> So long as it adheres to *Abood*, the State Bar is free to advocate  
(continued...)

We recognize that this principle is more easily stated than applied, particularly when dealing with the multifaceted activities of modern bar associations. Some lines, however, are clearer than others. Thus, it seems reasonably plain that the self-policing functions of the State Bar can be supported by mandatory dues. In the words of *Lathrop*, all lawyers are "subjects and beneficiaries" of programs designed to improve the quality of the legal profession. At the very least, this category would seem to include money spent on administering the bar examination and investigating claims of professional misconduct. It very likely includes the cost of continuing legal education, as well.

Bar activities designed to improve the administration of justice present a closer question in our view. On the one hand, they do not clearly pose the "free rider" problem that this Court has deemed so important in its other decisions. On the other hand, society-at-large has a special interest in the educated opinion of the legal profession on issues that touch their daily professional lives.

When confronted with similarly close questions in the past, this Court has proceeded cautiously. *E.g.*, *Hanson*, 351 U.S. at 238. We urge this Court to do so again. Specifically, we do not believe this case clearly presents the issue of whether mandatory dues can be used to subsidize the State Bar's position on such questions as the reform of court rules and increased compensation for judges. Nor do we think it is necessary for

---

<sup>9</sup> (...continued)  
whatever ideological cause it chooses in whatever forum it deems most advantageous. The *Abood* restriction is, therefore, a limited one. Specifically, the application of *Abood* to the facts of this case would "not require the [State Bar] to 'abandon or alter' any activities that are protected by the First Amendment." *New York State Club Ass'n v. City of New York*, 487 U.S. \_\_\_, 108 S.Ct. 2225, 2234 (1988).



this Court to reach those difficult questions in order to reverse the decision below.

By its own admission, the California Supreme Court has conferred upon the State Bar the broadest possible authority to use the mandatory dues it collects from every lawyer in the state for almost any purpose it chooses, so long as that purpose is vaguely related to "law." The only apparent exception to this virtual *carte blanche* is election campaigning, which is forbidden by the decision below regardless of its funding source. Short of that single limitation, the State Bar is free to use its mandatory dues to file an *amicus* brief in *any* case or lobby the legislature on *any* issue supported by a majority of its members.

Thus, for example, the decision below would allow the State Bar to use its mandatory dues to finance a lobbying effort in support of medicaid funding for abortion, or in favor of a constitutional amendment to reverse this Court's decision in *Texas v. Johnson*, 491 U.S. \_\_\_, 109 S.Ct. 2533 (1989). Those issues have obvious public import and lawyers undoubtedly have much to contribute to the public debate. But so do many other groups in society.

What the decision below fails to explain is why the state's interest with regard to lawyers is any greater than the state's interest in compelling all doctors to support the AMA's views on abortion, or compelling all veterans to support the VFW's views on a flagburning amendment. All of these are intensely political questions that, under the First Amendment, must be left to the individual conscience.<sup>10</sup>

---

<sup>10</sup> The First Amendment violation would be obvious if petitioners were barred from practicing law in California because of their unpopular political views. Cf. *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Keyishian v. Board of Regents*, 385 U.S. (continued...)

Put in the terms of *Abood*, the critical error by the court below was in assuming that any subject on which lawyers have expertise is germane to the purposes of an integrated bar and may therefore be supported through mandatory dues. This Court has never interpreted *Abood* so broadly. To the contrary, this Court never even mentioned the issue of expertise when it ruled, in *Ellis*, that dissenting union members could not be compelled to subsidize either a general organizing drive or union litigation that did not directly relate to the collective bargaining unit. 466 U.S. at 452-53.

Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees*, 468 U.S. 609, 638 (1984), sets forth a reasonable summary of the controlling constitutional principle:

[A] State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations.

Because the decision below loses sight of this principle, it must be reversed for further proceedings consistent with *Abood* and the cases that follow it.

---

<sup>10</sup> (...continued)  
589 (1967). The decision below uses the indirect means of compelled financial support to produce a constitutionally indistinguishable result.

### CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

Steven R. Shapiro  
(*Counsel of Record*)  
John A. Powell  
American Civil Liberties Union  
Foundation  
132 West 43 Street  
New York, NY 10036  
(212) 944-9800

Dated: November 15, 1989

100-50-21005

**SUPREME COURT OF THE UNITED STATES**  
**October Term, 1987**

**Edie Miller, et.al.,**

**Petitioners,**

**v.**

**State Bar of California, et.al.,**

**Respondents.**

---

**On writ of Certiorari to  
The California Supreme Court**

**Motion For Leave To File Amicus Curiae Brief**

**And**

**BRIEF OF AMICUS CURIAE**

**Joseph W. Little**  
**Amicus Curiae**  
**Admitted January 9, 1979**  
**3731 N.W. 13th Place**  
**Gainesville, FL. 32605**  
**(904) 392-2211**



No. 88-1905

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1989

Eddie Keller, et.al.,

Petitioners,

v.

State Bar of California, et.al.,

Respondents.

---

On Writ of Certiorari to  
The California Supreme Court

Motion For Leave to File  
Amicus Curiae Brief

---

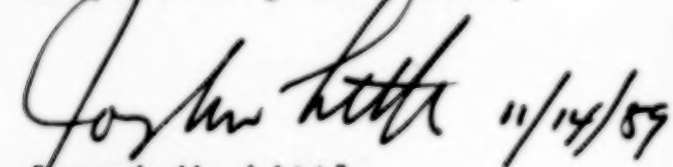
Pursuant to U.S. Supreme Court Rule 36.3, 28 U.S.C.A., Applicant for leave to file an amicus curiae brief submits the brief bound herewith and states:

1. Petitioners Keller et. al. granted written consent for applicant to file this brief, but Respondents State Bar of California et. al. declined to consent.

2. The nature of applicant's interest is stated on page 1 and 2 of the brief, infra.

3. A statement the questions of fact and law, relevance and reasons to believe they will not be adequately addressed by the parties is included as the last paragraph describing the nature of the applicant's interest, infra. p.2.

Respectfully submitted,

  
Joseph W. Little,  
Applicant

Admitted January 9, 1979  
3731 N.W. 13th Place  
Gainesville, FL. 32605  
(904) 392-2211

No. 88-1905

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1989

Eddie Keller, et.al.,

Petitioners,

v.

State Bar of California, et.al.,

Respondents.

---

On Writ of Certiorari to  
The California Supreme Court

BRIEF OF AMICUS CURIAE

Joseph W. Little  
Amicus Curiae  
Admitted January 9, 1979  
3731 N.W. 13th Place  
Gainesville, FL. 32605  
(904) 392-2211



## TABLE OF CONTENTS

	Page
Authorities.....	ii
Interest of amicus curiae.....	1
Summary of Argument.....	4
Argument.....	8
Conclusion.....	39
Certificate of Service.....	41

# TABLE OF AUTHORITIES

	Page
<u>Aboud v. Detroit Board of Education</u> , 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) .....	7,9,27
<u>Baird v. State Bar of Arizona</u> , 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed. 2d 639 (1971).....	16,18,26,26
<u>Branti v. Finkel</u> , 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed. 2d 574 (1980).....	22
<u>Cammer v. United States</u> , 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 474 (1956).....	20
<u>Chicago Teachers' Union v. Hudson</u> , 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed. 232 (1986).....	7,27,39
<u>Cohen v. Hurley</u> , 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 2d 156 (1961).....	16,21,34,35,37
<u>Cohen v. Wright</u> , 22 Cal. 207 (1863).....	15,16
<u>Erzinger v. Regents of University of California</u> , 187 Cal. Rptr. 164.....	11

<u>Ex Parte Garland</u> , 71 U.S. 333, 4 Wall. 333, 18 L.Ed. 366 (1866).....	16
<u>Ferri v. Ackerman</u> , 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed. 2d 366(1979).....	21,22
<u>Galda v. Rutgers</u> , 772 F.2d 1060 (3d Cir. 1985).....	11
<u>Garrity v. State of New Jersey</u> , 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967).....	35
<u>Gibson v. The Florida Bar</u> , 798 F.2d 1564 11th Cir. 1986).....	10
<u>In re Griffiths</u> , 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973).....	17,36
<u>Keller v. The State Bar of California</u> , 255 Cal. Rptr. 542 (Cal. 1989).....	4,8,25,31
<u>Lathrop v. Donohue</u> , 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961).....	27
<u>Miller v. California Com'n on Status of Women</u> , 198 Cal. Rptr. 877 (Cal. App. 3 Dist. 1984).....	12



<u>Pacific Gas &amp; Elec. v. P.U.C.</u> <u>of California</u> , 475 U.S.1, 106 S.Ct. 903, 89 L.Ed. 2d 1 (1986).....	6,29
<u>Re: Thomas R. Schwarz</u> , So.2d _____, 1989 WL 128593 (Fla.).....	3
<u>Schware v. Board of Bar Exam.</u> <u>of State of N.M.</u> , 353 U.S. 232, 77 S.Ct. 252, 1 L.Ed. 2d 288 (1957).....	17
<u>Spevack v. Klein</u> , 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967).....	16,21,35
<u>Supreme Court of N.H. v. Piper</u> , 444 U.S. 193, 105 S.Ct. 1272, 62 L.Ed. 2d 355 (1979).....	17
<u>United States v. Frame</u> , 885 F.2d 1119 (3d Cir. 1989).....	31
<u>Wooley v. Maynard</u> , 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed. 2d 752 (1977).....	6,28

## INTEREST OF AMICUS CURIAE

Amicus curiae Joseph W. Little files this brief in support of petitioners, KELLER, et.al.

Amicus Curiae is a member of The Florida Bar and the Bar of this Court. He is also professor of law at the University of Florida College of Law where he has taught law for 22 years.

Amicus curiae believes that modern integrated bars are becoming more prone to use integration rules and laws to press all lawyers into modes of political thought and action that are preferred by bar elites and those in control of the bars' decision processes. Amicus curiae further believes that the modern realities of law practice shift massive power to lawyers in large firms

and the relatively few with secure economic bases, and away from the many lawyers who practice in mundane circumstances and those few free spirits who choose to practice alone or in small groups. Amicus curiae believes that measures such as that imposed upon Eddie Keller et.al. in the decision below have the potential and tendency to drive the most independent and bravest lawyers out of the bar, or to dull their ardor with enforced conformity. If this proves true, the consequential systematic changes in the composition of the bar will make it more difficult for the bar at large to continue to produce the fearless advocates that have always come forward to champion unpopular and profitless causes in a manner that preserves and extends individual American freedoms. One of the central purposes of the First



Amendment is to foster and preserve these qualities of fearlessness and zeal.

Amicus curiae participated as amicus curiae in current proceedings in the Eleventh Circuit Court of Appeal (case #89-3388) against The Florida Bar by Robert E. Gibson, and in similar proceedings in the Supreme Court of Florida. See, Re Thomas R. Schwarz, \_\_\_\_ So.2d \_\_\_\_, 1989 WL 128593 (Fla.).

From a review of the petition for writ of certiorari granted by this Court, amicus curiae believes this brief's examination of the relationship between a state bar and its members is broader than will be made by the parties. Amicus curiae believes this larger scope will assist the Court in defining the true nature of the relationship between the two and explaining to the State Bar of California why the rules objected to by Keller

et.al. are both unconstitutional under the First Amendment and extremely unwise.

#### SUMMARY OF ARGUMENT

Keller v. The State Bar of California, 255 Cal. Rptr. 542 (Cal. 1989) holds that the California State Bar is a governmental agency and, because of that status, is not required to accommodate the objections of its members who dissent on First Amendment grounds to the use of compelled dues to support ideological and political lobbying activities which they oppose.

The prime error of Keller is its ipse dixit conclusion that state agencies need not concern themselves with First Amendment objections irrespective of the relationship between the governmental agency (e.g. the State Bar) and the objectors (e.g. lawyers who are compelled to be members). Keller

blithely justifies its holding by reference to a California decision involving persons who are forced to accept a condition they don't like as the price of receiving a state benefit, and another California decision involving general taxpayers who object to the political activities of a state agency. Keller pays no heed to how dramatically different the facts of Keller are from the earlier cases, even if they should be correct in their own terms.

Petitioners Keller et.al. are not mere beneficiaries of a state gratuity, nor are they general taxpayers. Moreover, as the following analysis demonstrates, neither are Petitioners employees of the State Bar nor are they officers of the State in any sense that diminishes their constitutional rights.



Instead, Petitioners are practitioners of a lawful profession in pursuit of a livelihood, which is a matter of right under the Constitution of the United States of America according to many decisions of this Court. The true relationship between the Bar and its members, therefore, is one of regulator (the State Bar) and regulatee (its compelled members).

Numerous decisions of this Court have held that a state agency may not use its regulatory powers to infringe the First Amendment rights of regulatees in the absence of demonstrating that the infringing action is narrowly tailored to satisfy a compelling state interest. See Wooley v. Maynard, 430 U.S. 705 (1977) and Pacific Gas & Elec. v. P.U.C. of California, 475 U.S. 1 (1986). Moreover, this Court has specifically held in

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Chicago Teachers' Union v. Hudson, 475 U.S. 292 (1986) that individuals who are forced by governmental regulators to associate with organizations as a condition of earning a livelihood may not be compelled to pay for political and ideological lobbying activities that they oppose. This is exactly the infringement that Petitioners protest.

This brief demonstrates that the Keller decision has neither stated nor justified a compelling state interest for the disputed ruling, and that the disputed ruling is not narrowly tailored. Indeed, Keller specifically calls for a broad application of the State Bar's powers irrespective of the First Amendment rights of dissenters.

The decisions of this Court demonstrate that the status of lawyer qua lawyer does not

justify a lower standard of constitutional protection than the constitution affords other occupations and professions. Hence, Keller is wrong in law and must be reversed. Moreover, Keller is extraordinarily poor policy. Its effect could be to deprive the bar and the nation of the few zealous advocates endowed with the spirit of independence and fearlessness who have always emerged when needed to undertake unpopular and dangerous representation, and to enrich the bar with satisfied conformists to whom principle is secondary to getting along with their careers.

#### ARGUMENT

Keller v. The State Bar of California, 255 Cal. Rptr. 542 (Cal. 1989), is an egregiously bad opinion because it wholly fails to acknowledge that lawyers, no matter



what the status of the bar organization the State of California requires them to join as a condition of receiving a license from the State to practice law, retain the right under the First Amendment not to be compelled to contribute money to support political or ideological lobbying on issues that are not central to the interests served by compelling membership in the Bar. The Supreme Court of California reached this untenable position by first ruling that the State Bar of California is "analogous to a governmental agency" (255 Cal. Rptr. 547-551) and, concluding from that, that the relationship between the Bar and its lawyer members is not controlled by the labor union line of cases including particularly Aboud v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed. 2d 261 (1977). In the process, the

California court distinguished cases that had applied Abood on the ground that they were not germane to the unique bar organization in California. See, e.g., Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986), distinguished at 255 Cal. Rptr. 542. From this analysis, the California Supreme Court further concluded:

If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other resources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, tolls, tuition, donations, or other sources for any purposes within its authority.

255 Cal. Rptr. 542 (Cal. 1989).

Once it had so decided, the court thereafter ignored the First Amendment beyond referring to two California court of appeal

decisions both of which, if correct, are plainly distinguishable from this case. Erzinger v. Regents of University of California, 187 Cal. Rptr. 164, certiorari denied 462 U.S. 1133, involved the use of dues that students of the University of California are compelled by the State to pay. Erzinger held that the State might use the compelled dues for purposes that the dissenters opposed on ideological grounds. Erzinger is probably wrong, see, e.g., Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985) cert. denied, 475 U.S. 1065, 106 S.Ct. 1375, 89 L.Ed. 2d 602 (1986) (holding that a university's requirement that students contribute to a nonpartisan student lobbying organization violates the First Amendment), but in any event the State of California does not force a student to attend the University



of California in order to get an education in that state. Other educational alternatives exist. By contrast, Eddie Keller and others must join the State Bar of California before the State of California will permit them to earn a livelihood practicing law in that state.

The California Supreme Court also referred to Miller v. California Com'n on Status of Women, 198 Cal. Rptr. 877 (Cal. App. 3 Dist. 1984), appeal dismissed 469 U.S. 806, which involved a taxpayers' action seeking to stop the legislative lobbying activities of a governmental commission on the status of women. Miller denied relief despite the fact that the commission received tax revenues to support activities that the dissenters opposed on ideological grounds. Miller, too, may be wrong, but, in any event,

the effect upon the individual general state taxpayer of having to support governmental activities which he opposes is far less concentrated and direct than the effect suffered by Eddie Keller and others of being compelled to pay dues directly to a state agency as a condition of earning a livelihood in the law.

The fault of the California Supreme Court's Keller decision is that it fails to examine and describe the nature of the relationship between the State Bar of California and members of the bar. Denominating the State Bar as a governmental agency is the beginning, not the end, of the required analysis. Consequently, Keller failed to acknowledge the limits the United States Constitution places upon the power of the State to condition the relationship. By

referring to Ersinger and Miller - the court denied the labor union - employee relationship, but implicitly and alternatively likened the relationship to that of a voluntary recipient of a governmental benefit to the State (i.e. student at state university) and to that of a general taxpayer of the State. The California court completely ignored the fact that the relationship between lawyer and the bar is entirely different from any of these.

Although the State of California has wide discretion in defining legal relationships in California, the conditions it imposes upon them may not violate rights guaranteed individuals by the United States Constitution. In the absence of any state law, citizens of California, as citizens of the United States, would be freely permitted



to practice law in that state without State encumbrances. Nevertheless, the State of California has not left this field unregulated. As long ago as 1863, the Supreme Court of California stated, "The practice of law is a privilege to which the Legislature may attach such conditions as it may deem proper, and a breach of the condition is a forfeiture of the right." Cohen v. Wright, 22 Cal. 297, 321, 322 (1863). Cohen also held that "the occupation of a lawyer is not an 'office'." (e.s.) Id. at 322. The issue raised by Keller is whether the State may impose the condition upon the "occupation of a lawyer" that a practitioner must provide money to a state agency to permit it to engage in political and ideological lobbying activities the practitioner opposes. For the answer to that question, we must look to the

United States Constitution and the decisions of this Court.

This Court has often endorsed "the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law." Cohen v. Hurley, 366 U.S. 117, 122, 81 S.Ct. 954, 958 (1961), overruled, Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625 (1967). Indeed, at seeming odds with the California Cohen v. Wright decision, this Court has specifically held, "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character." Baird v. State Bar of Arizona, 401 U.S. 1, 10, 91 S.Ct. 702, 707 (1971). See also Ex Parte Garland, 71 U.S. 333, 379 (1866), wherein this Court described the right as one of which a lawyer "can only be deprived by the judgment of the Court, for

moral or professional delinquency." And, in Supreme Court of N.H. v. Piper, 444 U.S. 193, 105 S.Ct. 1272, 1277, 62 L.Ed. 2d 355 (1979), this Court stated "that the opportunity to practice law should be considered a 'fundamental right.'"

Given this status, this Court has stated that a state may not "exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schwartz v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 238, 77 S.Ct. 252, 756 (1957). Moreover, any encumbrance imposed by the State must satisfy a legitimate State interest and must not deny a federally protected right. In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910



(1973). On the other hand, the State may and has employed its police powers to qualify that right to protect the interest of the public. See e.g., Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 719 (1971). These qualifications, however, are police powers' conditions on the United States constitutional rights of the citizens of California to engage in a profession within the state and are not welfare or other benefits provided as a matter of grace from the State. Hence, the welfare or state beneficiary analogy Keller drew to Erzinger, to the extent the latter decision is otherwise sound, fails and must be rejected.

Similarly, the taxpayer - state relationship of Miller must also be rejected. Petitioners herein do not complain as general taxpayers about an imposition that all

taxpayers bear, but they complain as members of a profession as to a non-tax imposition that they alone are required to pay as a condition of earning a livelihood in the practice of law. Hence, it is not enough for the State to conclude that bar dues become state funds to be spent as any other state funds, as the Supreme Court of California held, 255 Cal. Rptr. at 542, but inquiry must also be made as to whether the process by which the dues are imposed violates the First Amendment rights of dissenters.

Two relationships left unexplained by the decision below are the State Bar as employer and lawyer members as employees, and the State Bar as regulator and members as regulatees. Nothing about the Bar-lawyer relationship supports a determination of an employment relationship. As noted above, the

California Supreme Court has referred to the practice of law as an "occupation." And as for this Court, it has long held that the common appellation of a lawyer as an "officer of the court" does not place "attorneys in the same category as marshalls, bailiffs, court clerks or judges." Cammer v. United States, 350 U.S. 399, 405, 76 S.Ct. 456, 459 (1956). Instead, this Court has said, "unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term." Id.



Further, this Court has said, "It is no less true than trite that lawyers must operate as a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants of the court in search of the truth." Cohen v. Hurley, supra, 81 S.Ct. at 958. As succinctly summed up by Mr. Justice Fortas, "But a lawyer is not the employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State." Spevack v. Klein, 385 U.S. 511, 529, 87 S.Ct. 625, 630, 17 L.Ed. 2d 574 (1967) (Fortas, concurring). Finally, Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed. 2d 355 (1979) makes the point in the most telling terms. In Ferri, this Court held that even a lawyer appointed by a state court to defend

an indigent person is not an employee of the state and hence has no judicial immunity to a malpractice action brought against him by his former client. As this Court said in Ferri, "an indispensable element of the effective performance of [the lawyer's] responsibilities is the ability to act independently of the government and oppose it in adversary litigation." 100 S.Ct. at 409. A fortiori, the Supreme Court of California's denomination of the State Bar as a "governmental agency" has not deprived a member of the bar "of his responsibilities to act independently of the government and oppose it in adversary litigation." In short, it has not created an employment relationship between members of the bar and the State Bar. But even if the conclusion were otherwise, this Court's decision in Branti v. Finkel,

445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed. 2d 574 (1980) and other cases would deny the Bar the power to exact money from its employees as a condition of employment to pay for the Bar's ideological lobbying.

This analysis leaves only the regulator - regulatee relationship as the true legal relationship between the State Bar and its members compelled to join it as a condition of practicing law in the state. In this regard, the governmental agency that is the California State Bar must not be permitted to arrogate to itself the personality of the legal profession at large or the high and noble accomplishments of lawyers in society. Thus, the capacity of lawyers to speak out on public issues before state legislatures and elsewhere is not and has never been dependent upon the words or grace of a governmental



agency called the State Bar; nor have lawyers ever been dependent upon a governmental agency called the State Bar to represent the poor and unpopular even against the states themselves. Thus, any plea that a State Bar gives "voice" to lawyers must be rejected as factually and historically unsound (and currently so as evidenced by the facts that numerous states operate without integrated bars and that several of the integrated bars eschew legislative lobbying) and politically foreign to our mode of governance under the Constitution of the United States of America. In other words, the State may not bootstrap itself into the role as a "voice of lawyers" by making a finding that the state has a need to have lawyers speak out in solido on public issues and, then, require all lawyers to pay money to support the particular view of what

lawyers ought to be saying that is espoused by the State Bar. It is exactly this sort of bootstrapping that the Supreme Court of California committed in Keller. See, particularly, 225 Cal. Rptr. 552, 553. Contrary to this erroneous view, a lawful regulator of a fundamental right of the regulatee must tailor the regulation to narrow and appropriate purposes necessary to protect the public.

It is much too late in the day to maintain, as does Keller, that regulation by a state agency somehow submerges the First Amendment rights of the regulatees to a lesser status than enjoyed by other citizens whose rights the state may not infringe by similar forms of state action. Indeed, in Baird v. State Bar of Arizona, supra, this Court, referring to state regulation of lawyers,

said, "The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a political organization or because he holds certain beliefs.... Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment." 91 S.Ct. at 706. From that foundation, Baird concluded, "Without detailed reference to all prior cases, it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to bar an applicant from the practice of law." Id, at 707.

Keller, of course, asks an extended question, to wit, "May the State, while not squelching a lawyer in whatever political and ideological views he may individually endorse



and express, nevertheless require a lawyer as a condition of obtaining a license to practice law, support political and ideological lobbying activities of the State that have nothing to do with the narrowly tailored purposes that justify the state's requiring the license, and to which the lawyer dissents?" This is exactly the question this Court left undecided in Lathrop v. Donohue, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961). Nevertheless, Lathrop foreshadowed this Court's decisions in Abood and Chicago Teachers' Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed. 2d 232 (1986), and the foregoing analysis demonstrates that those two cases foreshadow the proper disposition of Keller. Indeed, it demonstrates that Keller is fundamentally no different from them.

Amicus curiae will not reargue Abood and Hudson. The only issues here are whether they apply to Keller, and, if they do, whether the State of California has a great enough interest to compel lawyers to contribute to the State Bar's wide ideological and political lobbying activities to require a different outcome. Before arguing that the State has no such interest, and if it does, that it certainly has not narrowly tailored its approach to minimize First Amendment infringement, I will first refer to three recent cases that strongly negative the power of the state in analogous applications. In Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed. 2d 752 (1977), this Court held that a State as regulator may not compel a state licensee to display publicly the State motto "Live Free or Die" when to do so

violated the objector's ideological scruples. Wooley does not place in question the power of the State to require the objectors to obtain and display a license plate for the central public welfare purposes served by licensing; but its holding plainly acknowledges that the State may not bootstrap itself into a power that it cannot exercise directly by attaching its exercise as a condition to one that it can. By the same token, the State Bar cannot bootstrap itself into taxing members for ideological lobbying purposes by adding the tax to the imposition that it can require.

Similarly, in Pacific Gas & Elec. v. P.U.C. of California, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed. 2d 1 (1986), this Court held that the State of California cannot compel a regulated utility company to distribute



political information that it opposes to its consumers as a condition of conveying its own political views to them. According to this Court, to do so "impermissibly burdens [the complainants'] First Amendment rights because it forces [complainant] to associate with the views of other speakers....[and] the order is not a narrowly tailored means of furthering a compelling state interest." (plurality opinion) 106 S.Ct. at 914. By parity of reasoning, neither can the State of California compel a licensee of the State Bar to provide financial support for the political and ideological views of others with which he disagrees. This is particularly true where the State not only has not narrowly tailored the purposes for which compelled financial support may be used but has also specifically mandated that "In the

context of lobbying and amicus curiae activities [which Keller et.al. object to], this language should be read broadly." Keller, 255 Cal. Rptr. at 552. (e.s.)

Finally, United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), held that the federal government's program to support the beef industry affected beef producers' First Amendment rights to the extent that it required members of the industry to contribute money to pay for an advertising campaign to promote the sale of beef. Emphasizing that the program forbade the use of the funds for any political or ideological purpose other than promotion of the sale of beef, the majority of the court held that the government's purpose in supporting a declining beef industry and the narrowly tailored program justified the resulting infringement

of the complainant's First Amendment rights, which the court saw as only commercial in character. Although I endorse Judge Sloviter's dissenting view that government may not compel a member of an industry to contribute to an advertising campaign for the benefit of a particular industry, the Frame majority clearly acknowledges the essential point in this case. That is, the First Amendment requires governmental regulatory agencies to confine compelled contributions to promote specific and narrow governmental purposes of the agencies and it forbids them to compel regulatees to support wider political and ideological agendas. Keller fails this test.

This, then, brings the Court to the final question. Does the State have some peculiar and compelling interest to serve that



justifies submerging the First Amendment rights of lawyers below those of people in other occupations? I have already shown that the assertion that the State has a compelling interest in the unified weight of the voice of lawyers on some issues won't do. Any so-called unified voice would necessarily be a lie if it purports to be a unanimous opinion. The State has no interest in promoting lies. Moreover, no one has or could make a showing that any matter of concern to the California legislature suffers from a dearth of reasoned and scholarly comment from lawyers representing all points of view. It would be hard to convince an informed and objective observer that a compelled unified voice of lawyers would not be detrimental to free and robust expression, much less could it be persuaded that it was a good thing.

Hence, looking through the lens of close scrutiny, this Court will be unable to find a compelling state interest to justify the disputed imposition.

Is there something on the other end of the regulatory polarity that justifies the imposition? That is, do lawyers by being lawyers concede to the submission of conditions on constitutional rights that are justifiable on lesser grounds than would apply to other occupations? This Court once held that lawyers had a lesser right not to be compelled to testify against themselves than others enjoyed. Cohen v. Hurley, supra. This was done over Justice Douglas' indignant retort that, "There is no exception in the Fifth Amendment for lawyers any more than there is for professors, Presidents, or other office holders." 81 S.Ct. at 974 (Douglas,

dissenting.) Cohen v. Hurley festered for only six years until the Douglas view prevailed and flatly overruled it in Spevack v. Klein, supra. With Spevack this Court cemented the point that any attempt to deny lawyers as lawyers of United States Constitutional rights must be submitted to the same rigorous scrutiny as would be given attempted restrictions of the rights of others. Indeed, in Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967), this point was so well accepted that this Court used the reverse analogy, i.e., "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." 87 S.Ct. at 620 (e.s.).

From a technical point of view, Spevack and the decisions of this Court referred to



herein, particularly Baird v. State Bar of Arizona, doom the California Keller decision. Nevertheless, a few words should be said as to why Keller is bad policy as well as bad law. Lawyers do have an unusual role in the development and continued preservation of our cherished political freedoms. As this Court once observed, "by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country." In re Griffiths, 93 S.Ct. at 2851. Yet this panegyric does not fall fittingly on all lawyers. Most lawyers, like most practitioners of any occupation, plod through careers that are undistinguished by any notable episode of bravery or act of exceptional public service. Still, throughout our history, when the chips are

down some lawyer has come forward to pick up the gauntlet and fight the unpopular or dangerous fight. Members of this Court have often referred to these episodes. Justice Black once reminded us that, "It is to the lasting credit and renown of the colonial bar that Andrew Hamilton, a lawyer of Philadelphia, defied the hostility of the judges, defended and brought the acquittal of [John Peter] Zenger." Cohen v. Hurley, 81 S.Ct. at 968 (Black, dissenting.) Hamilton did the brave act but bar got the credit and fame.

What will be the ultimate effect of a decision such as Keller upon the long run capacity of the bar to uphold this tradition? Will Eddie Keller simply accept the imposition, thus submitting against the weight of the State to the disparagement of

his beliefs? Or will he resign from the bar and make his living in some other occupation? Whatever the outcome, the consequence will be a deflation of the independent fearlessness of the bar. In the future, the bar may be populated by a much greater proportion of pliable conformists and a much smaller portion of fearlessly independent spirits. The bar may be less able and willing to accept the great challenges of freedom. Though the effects would manifest themselves slowly and would be hard to measure, I believe they would surely be detrimental and perhaps dangerous to the future of our country. Alexander Hamilton and Thomas Jefferson had many political disagreements in life, but were they living today, I believe both would be standing with Eddie Keller.



## CONCLUSION

In conclusion, amicus curiae asserts that Keller is wrong and urges this Court to reverse and hold that the State Bar of California may not compel its members to pay to support political and ideological activities that they oppose. Furthermore, amicus curiae urges the Court to issue a ruling requiring the State Bar, if it is to continue its practices of political and ideological lobbying, to abide by procedures that Chicago Teachers held to be "necessary" to the protection of First Amendment rights of dissenters; namely, (1) an "appropriately justified advance reduction" of dues for the benefit of dissenters, (2) an escrow of disputed amounts of dues that are paid; (3) a "prompt impartial decisionmaker" as to disputes that are raised about the

appropriateness of the advance deduction; and  
(4) payment of interest on portions of  
escrowed dues ultimately refunded to  
dissenters.

Respectfully submitted,

*Joe W. Little 11/14/8*  
Joseph W. Little

Amicus Curiae

Admitted January 7, 1979

3731 N.W. 13th Place

Gainesville, FL 32605

904-392-2211

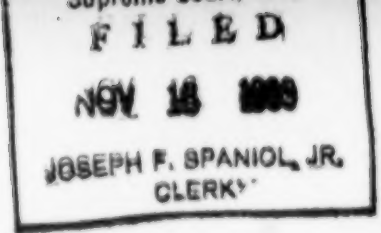
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was posted by United States mail to Diane Yu, State Bar of California, 555 Franklin, San Francisco, California 94102, and Anthony Caso, Pacific Legal Foundation, 2700 Gateway Oaks Drive, Sacramento, California 954833.

Joseph W. Little



(13)  
No. 88-1905



**In The  
Supreme Court of the United States  
October Term, 1988**

---

**EDDIE KELLER, et al.**

*Petitioners,*

**v.**

**STATE BAR OF CALIFORNIA, et al.**

*Respondents.*

---

**On Petition For Writ Of Certiorari  
To The California Supreme Court**

---

**BRIEF OF STEVEN LEVINE AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

---

**STEVEN LEVINE  
3220 Creek View Drive  
Middleton, WI 53562  
(608) 266-1264 (office)  
(608) 836-1648 (home)**

*Attorney for Amicus Curiae  
And Counsel of Record*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	2
I. PARTICIPATION BY AN INTEGRATED BAR IN THE LEGISLATIVE PROCESS IS A SIG- NIFICANT CONSTITUTIONAL INFRINGE- M E N T R E Q U I R I N G A N ACCOMMODATION WITH FIRST AMEND- MENT RIGHTS, AS IN UNION SHOP CASES. WISCONSIN HAS ADOPTED SUCH AN ACCOMMODATION. ....	2
A. Introduction .....	2
B. Background of the Plan .....	2
C. Substance of the Plan .....	5
D. Operation of the Plan .....	7
CONCLUSION .....	9

## TABLE OF AUTHORITIES

	Page
CASES:	
<i>Arrow v. Dow</i> , 544 F. Supp. 458 (D. N.M. 1982).....	8
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986) .....	6
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984).....	6
<i>In re Regulation of the Bar of Wisconsin</i> , 81 Wis. 2d xxxv (1977).....	3
<i>In the Matter of the Amendment of State Bar Rules:</i> <i>SCR 10.03(5) – Members Dues Reduction</i> , 127 Wis. 2d xi (1986) .....	6
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961).....	2, 3
<i>Petition to Review Bar Amendments</i> , 139 Wis. 2d 686, 407 N.W. 2d (1987) .....	6, 8
<i>Report of Committee to Review the State Bar</i> , 112 Wis. 2d xix, 334 N.W. 2d 544 (1983).....	5, 8
OTHER AUTHORITIES:	
<i>Legislative activities dues reduction</i> , Wisconsin Bar Bulletin, Vol. 59, No. 12 (Dec. 1986) .....	7
Wisconsin Supreme Court rule 10.03(5)(b) .....	5

Steven Levine submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petitioner in No. 88-1905, having obtained the written consent of both petitioner and respondent to file this brief.

---

### INTEREST OF AMICUS CURIAE

Attorney Steven Levine is a lawyer licensed to practice law in Wisconsin. He is a former two-term member of the State Bar of Wisconsin Board of Governors and has been a participant in proceedings before the Supreme Court of Wisconsin leading to that court's adoption of a state bar dues reduction rule whereby members who object to their dues being used for legislative purposes may reduce their annual dues. He is currently involved in litigation in the United States District Court for the Western District of Wisconsin in a case which in part involves the same issue as is involved in this case – and which may be controlled by the court's decisions in this case.

The purpose of this brief is to provide the court with information concerning the history, adoption and operation of the "Member Dues Reduction Rule" adopted by the Supreme Court of Wisconsin which allows bar members to withhold the pro rata share of their bar dues used for legislative advocacy purposes. It is a way in which one state supreme court has balanced the wishes of an integrated bar to be active in the legislative arena with the First Amendment rights of bar members who do not wish to be forced to support positions with which they disagree. As such, the rule may be helpful to this court in resolving the issue involved in this case.



## ARGUMENT

### I. PARTICIPATION BY AN INTEGRATED BAR IN THE LEGISLATIVE PROCESS IS A SIGNIFICANT CONSTITUTIONAL INFRINGEMENT REQUIRING AN ACCOMMODATION WITH FIRST AMENDMENT RIGHTS, AS IN UNION SHOP CASES. WISCONSIN HAS ADOPTED SUCH AN ACCOMMODATION.

#### A. Introduction

The question of whether and to what extent integrated bars may participate in the legislative process is an issue of significance across the country. The purpose of this brief is to inform the court of how one state is attempting to balance the wishes of the bar to be active in the legislative process with the First Amendment rights of dissenting members. The State of Wisconsin has adopted a plan whereby individual bar members may deduct the pro rata share of their mandatory bar dues which is used for legislative advocacy purposes. The purpose of this brief is to describe the background and workings of that plan.

#### B. Background of the Plan

In *Lathrop v. Donohue*, 367 U.S. 820 (1961) this court upheld integration of the State Bar of Wisconsin. In a plurality decision, the court held that the state's interest in improving the educational and ethical standards of the bar justified the restriction on First Amendment rights:

Both in purport and in practice the bulk of State Bar activities serve the function, or so Wisconsin

might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of legal service to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interest in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory programs, the lawyers, even though the organization created to obtain the objective also engages in *some* legislative activity. *Id.* at 843. (Emphasis added)

The court declined to decide the issue of bar participation in the legislative process, however, determining that the record was inadequate to base a decision on this issue.

At the time of *Lathrop*, this court described the bar's participation in the legislative process as minor, as "some legislative activity." *Id.* at 843. By the late 1970's, however, legislative activity was described by the bar and noted by the Supreme Court of Wisconsin to be one of the bar's three major functions. *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xxxvi (1977).

With this change in emphasis of bar activity in mind, the Wisconsin Supreme Court in 1983 determined to adopt a dues reduction plan to allow dissenting bar members to deduct the pro rata share of their dues used for legislative purposes.

In response to the recommendation of a committee appointed by the court to study all aspects of bar operation, including legislative activity, the court determined to adopt a rebate procedure to protect the First Amendment rights of dissenting bar members who did not want their mandatory dues used for legislative purposes. The court stated:

This recommended rebate procedure is obviously in response to recent case law which addresses the issue of the use of mandatory membership dues to support political or ideological activity to which an individual member is opposed. See, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 265 N.W. 2d 559 (1978), *Falk v. State Bar of Michigan* (plurality opinion), 411 Mich. 63, 305 N.W. 2d 201 (1981), *Arrow v. Dow*, 544 F. Supp. 458 (D. N.M. 1982), *Schneider v. Colegio de Abogados de Puerto Rico*, 546 F. Supp. 1251 (D. P.R. 1982). Assuming, *arguendo*, that those cases are applicable here, we believe that the rebate procedure proposed by the committee is an acceptable and adequate response to any claimed infringement on the rights of those association members who oppose the association's position on specific legislation. Moreover, in order that a dissenting member not be required to specify those legislative issues on which the association has taken a position to which he or she is opposed, the rebate procedure should entitle a member to a rebate for that portion of his or her dues spent on all legislative activity, without specification, and if the objecting member wishes to contribute part of the rebated amount in proportion to the amount spent on legislative issues to which he or she was not opposed, he or she may do so voluntarily. In response to this recommendation

of the committee, we will propose such a rebate procedure for inclusion in the rules governing the State Bar, and we will hold a public hearing on the proposal, with a view to implementing a rebate procedure prior to the conclusion of the coming legislative session.

*Report of Committee to Review the State Bar*, 112 Wis. 2d xix, xxiii, xxiv, 334 N.W. 2d 544 (1983).

### C. Substance of the Plan

Subsequent to hearings, the Supreme Court of Wisconsin in 1986 adopted SCR 10.03(5)(b). The rule states:

1. In this paragraph, "legislative activities" means activities intended to advocate a position of the state bar with respect to contemplated, pending or existing legislation. "Legislative activities" does not include the review and analysis of contemplated, pending or existing legislation not intended to influence that legislation.
2. Prior to the beginning of each fiscal year the state bar shall establish, as part of its annual budget for that year, a budget specifically for legislative activities for that year and shall set forth in the dues statement it sends to its members for that year each member's pro rata portion, according to class of membership, of the amount budgeted for legislative activities.
3. A member of the state bar may deduct from the mandatory dues payable for each fiscal year the member's pro rata portion of the amount budgeted for legislative activities, and the state bar's established budget for legislative activities for each fiscal year shall

be reduced by the total amount of mandatory dues deducted by members for that year.

4. A member of the state bar not required to pay dues shall be given the opportunity at the beginning of each fiscal year to indicate on a form supplied by the state bar whether or not the member approves of the state bar's legislative activities for that year.

See *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5) – Member Dues Reduction*, 127 Wis. 2d xi, xii (1986). As explained in the court's order, the rule was changed from the dues rebate rule proposed in the notice of hearing to a dues reduction rule after the court considered "judicial decisions of other jurisdictions on the issue of the constitutionality of a procedure by which an organization's member dues are rebated to members after the dues have been paid and the organization has had the use of them for a period of time." 127 Wis. 2d at xi. See *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

Subsequent to adoption of this rule by the Supreme Court of Wisconsin, the state bar itself adopted an arbitration procedure "to resolve any dispute with regard to the calculation of the dues reduction." See *Petition to Review Bar Amendments*, 139 Wis. 2d 686, 689, 407 N.W. 2d 923 (1987). The procedure was prompted by this court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Thus, the Wisconsin Supreme Court and State Bar of Wisconsin have adopted a dues reduction rule and dispute arbitration rule specifically modeled on this court's pronouncements in the union shop cases.

#### D. Operation of the Plan

Operation of the Wisconsin dues reduction plan has been both simple and practical. The Wisconsin supreme court's rule requires that the bar set a budget for legislative activities prior to each fiscal year. That budget is based on both an estimate of how much will be spent on legislative activities for the coming year as well as the amounts spent on those activities in each of the past three years. See *Legislative activities dues reduction*, Wisconsin Bar Bulletin, vol. 59, no. 12, p. 22 (Dec. 1986).

The total legislative activities budget is divided by the number of bar members – by class of membership – to arrive at the amount of dues reduction which each member may choose to subtract from his or her annual dues payment. All legislative advocacy expenses are included in the plan. There is no attempt to differentiate expenses by subject matter on which the bar takes legislative positions – no attempt to exclude from the dues reduction plan legislative activity which might be classified as pertaining to "the administration of justice." All legislative activity as defined in the supreme court rule is included in the plan. In the first year of the plan's operation, approximately 30% of bar members withheld the legislative activities amount from their dues payment. *Id.* at p. 23.

While there remain serious constitutional questions concerning certain substantive and procedural aspects of the Wisconsin dues reduction plan, adoption and operation of the plan illustrate a number of points. First, the plan indicates a recognition by one state supreme court of the impropriety of forcing bar members to contribute to



the advocacy of legislative positions with which they disagree.

Second, the plan aims at simple and practical operation – not involving itself in attempting to differentiate legislative advocacy on subjects which might be defined as “the administration of justice” from other topics outside that classification. If error is to be made in balancing the First Amendment rights of mandatory bar members against those of bar legislative activity, the plan errs in favor of those bar members who do not wish to subsidize the propagation of views with which they disagree.

Finally, the legislative activities dues reduction rule as well as the bar’s arbitration bylaw are patterned after the requirements of this court’s decisions in the union shop cases – *Abood*, *Ellis*, and *Chicago Teachers Union*. See *Report of Committee to Review the State Bar, supra*, 112 Wis. 2d at xxiii and *Petition to Review Bar Amendments, supra*, 139 Wis. 2d at 691. The plan constitutes a recognition that lawyers deserve the same First Amendment rights as the members of any other profession:

The First Amendment does not distinguish between lawyers and other occupations. Unless there is an important governmental interest requiring otherwise, lawyers are entitled to the same protection from the compelled support of ideas that are accorded labor union members.

*Arrow v. Dow*, 544 F. Supp. 458, 460, 461 (D. N.M. 1982).

---

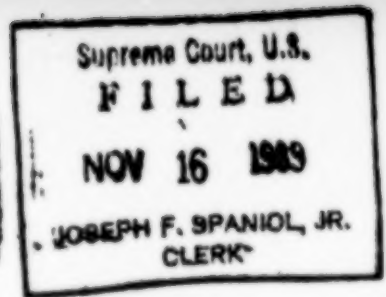
## CONCLUSION

Members of compulsory bar associations ought not be forced to participate in the legislative process against their wills or to financially support legislative positions with which they disagree.

The Wisconsin dues reduction plan constitutes a necessary accommodation of conflicting rights based on this court’s decisions in the union shop area.

Respectfully submitted,

STEVEN LEVINE  
3220 Creek View Drive  
Middleton, WI 53562  
608/836-1648 (home)  
608/266-1264 (office)



CASE NO. 88-1905

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EDDIE KELLER, et al.,

*Petitioners,*

*vs.,*

STATE BAR OF CALIFORNIA, et al.,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE CALIFORNIA  
SUPREME COURT*

BRIEF OF AMICUS CURIAE, GIBSON,  
IN SUPPORT OF PETITIONER

HERBERT R. KRAFT  
1020 E. Lafayette St. Ste. 210  
Tallahassee, Florida 32301  
(904) 877-7139  
Counsel of record for Amicus

# TABLE OF CONTENTS

	Page
Table of Authorities Cited .....	ii
Interest of Amicus Curiae .....	1
Summary of Argument .....	2
Argument .....	6
I. The First Amendment Controls the California Legislature's Imposition of Fees Required to Practice Law So Long as the Fees Are Used for Lobbying .....	6
II. Attorneys Have the Same Constitutional Rights as Those in Other Fields of Endeavor .....	11
III. The Practice of Law is Part of Interstate Commerce, and the States Cannot Condition the Right for a Qualified Individual to Practice Law on a Waiver of First Amendment Rights .....	12
IV. The Appropriate Remedy is a Positive Checkoff System .....	14
V. To Minimize the First Amendment Injury, a Disclaimer Should Be Mandated by this Court .	19
Conclusion .....	21
Appendix	
The Florida Bar Re: Thomas R. Schwarz .....	22



## TABLE OF AUTHORITIES CITED

Cases	Page
Abood v. Detroit Board, 431 U.S. 209(1977) .....	8, 15
Arrow v. Dow, 544 F.Supp. 458(D.N.M. 1982) .....	6
Baird v. State Bar of Arizona, 401 U.S. 1 at U.S. 8 ...	9, 10
Branti v. Finkel, 445 U.S. 507(1980) .....	11
Brotherhood of Railroad Trainmen v. Virginia. 377 U.S. 1(1964) .....	8
Chicago Teachers v. Hudson, 475 U.S. 292(1986) ...	8, 14
CWA vs. Beck, 487 U.S. ___, 101 L. Ed 2d 634(1988) 4	
Ellis v. Railway Clerks, 466 U.S. 435(1984) at 455-456 .	15
Florida Bar Re: Amendment to Rule 2-9.3, 526 So. 2d 688(Fla. 1988) .....	7
Florida Supreme Court, 526 So. 2d 688 (Fla. 1988) ....	16
Garrity v. State of New Jersey, 385 U.S. 493(1967) at 500 .....	13
Gibson v. The Florida Bar, 789 F.2d 1564(11th. Cir. 1986) at page 1565 .....	1, 6, 8
Goldfarb v. Virginia State Bar, 421 U.S. 773(1975) ....	13
In re The Florida Bar, 439 So. 2d. 213(Fla. 1983) .....	6, 7
International Associations of Machinists v. Street, 367 U.S. 740(1961) .....	8
Lathrop v. Donohue, 367 U.S. 820(1961) .....	5, 19
Levine v. Heffernan, 864 F.2d 457(7th Cir. 1989) .....	19

Romany v. Colegio de Abogados, 742 F.2d 32(1st. Cir. 1984) .....	6
Rule 2.92 of the Bylaws of the Florida Bar .....	16
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) .....	3, 9, 10
Supreme Court of N.H. vs. Piper, 470 U.S. 272(1985) at 277 .....	13, 14
Terral, Secretary of State of Arkansas v. Burke — Construction, 257 U.S. 529(1922) .....	13
The Florida Bar, Re: Thomas R. Schwartz, Case No. 70,702, 10-26 89, ___ So. 2. ___, (Fla. 1989) ..	7, 17
Virgin Islands Bar vs. Government of Virgin Islands, 648 F.Supp. 170(D.Virgin Islands 1986) .....	6

### INTEREST OF AMICUS CURIAE

Gibson files this brief in support of the position of petitioner, KELLER. Consent has been procured for the filing of this brief from the parties hereto, and has been filed with the Clerk.

Amicus Curiae Robert E. Gibson is a member of the Florida Bar in good standing, and has been a member for 25 years. The Florida Bar, like the California Bar, requires payment of a yearly membership fee, part of which is used for lobbying on ideological issues unrelated to its purpose and beyond its authority to use compulsory fees therefor. [This statement is a matter of record, See *Gibson v. The Florida Bar*, 789 F.2d 1564(11th. Cir. 1986) at page 1565.] Gibson objects to the use of his dues for the purpose of lobbying, and, as noted above, has sued under the Civil Rights Act to protect his rights. Gibson currently has his case on Appeal on the question of remedy, which case has been taken under advisement after argument by the Eleventh Circuit. Gibson urges that the First Amendment is applicable to California's regulatory scheme, and especially desires to inform the Court on the issue of remedy.

### SUMMARY OF ARGUMENT

The California Supreme Court's decision in this matter is in error, as it countenances a violation of the First Amendment rights of Californians who are otherwise eligible for Bar admission, or to practice law, but who do not wish to financially contribute to support the ideological / political / lobbying activities of the California Bar unrelated to lawyer regulation and administration of the legal system.

The payment of bar dues, however they are characterized, is for purposes of First Amendment analysis, identical to union fees in "union shops" and is not a general tax. The State of California cannot condition the fundamental right to exercise a lawful profession by requiring a waiver of a constitutional right. In the present case, the State of California, whether acting through its legislature or through its Courts, cannot mandate that attorneys waive their First Amendment rights as a precondition of practicing law, so long as they are otherwise qualified.

The fact that a legislature authorizes such violations, rather than a Supreme Court acting within its inherent authority to regulate the Bar is superfluous to the inquiry. As noted in a long line of decisions in the analogous situation of trade union fee payments by non-members who do not wish to contribute to political/ideological/lobbying, a

legislature may not require enforced contributions to such lobbying. Consequently, KELLER's forced membership and dues payments are infringements on the right not to associate recognized by the *Abood* case and its progeny.

This Court, beginning with its decision in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), has held that ideological tests may not be used to deprive a person of admission to the bar, if they are otherwise qualified. Like KELLER, Gibson meets all requirements for admission (he was admitted in 1964) and for retaining his membership in The Florida Bar, including education, being of good character, continuing education and examination requirements. The state simply lacks the power to require in addition to such requirements that a prospective lawyer or already admitted lawyer make involuntary monetary contributions to allow ideological lobbying on partisan political issues unrelated to:

- a) the regulation of attorneys;
- b) law school admissions and bar admissions;
- c) legal aid appropriations and judicial salaries;
- d) regulation of trust accounts;
- e) litigation procedures.



See *Gibson v. The Florida Bar*, 798 F.2d at 1569, note 4. If political beliefs are irrelevant and improper bases for determining admission to the bar, or retention of legal employment, such ideological tests are also improper and irrelevant to the retention of bar membership.

Such protections have been made available to other groups such as railroad workers, (*Ellis*); public school teachers; (*Abood* and *Chicago Teachers*); assistant public prosecutors (*Branti*) and communications workers (*CWA vs. Beck*, 487 U.S. \_\_\_, 101 L. Ed 2d 634(1988)). The Court should now find that whether enacted by a Court or by a state legislature, bar dues or a fee called a "tax" imposed solely on lawyers as a precondition of being a member of the bar, are subject to First Amendment limitations on such expenditures for ideological reasons.

The legal profession is a part of interstate commerce. A state may not precondition the fundamental right of exercising a profession, for which KELLER is qualified and which is interstate commerce, on a waiver of First Amendment constitutional rights.

Amicus further urges that this Court, after finding that this matter is governed by the *Abood* line of cases, take this occasion to amplify the specific procedures required for the use of dues and hold that in all cases of publicly compelled association as a requirement for employment that the appropriate "least restrictive means" is a "positive

checkoff" allowing dissenters to pay only the non-ideological fee, and, that the Court further rule that "unions" or "bar associations" must allocate overhead that supports lobbying to the amount permitted for checkoff.

Recent decisions of lower Courts, and this Court's decision in *Lathrop v. Donohue*, 367 U.S. 820(1961) recognize that a state may compel membership in state integrated bar associations as a precondition of practicing law. Such compelled membership countenances a significant intrusion into the First Amendment rights of attorneys. Unlike union cases, in which a person can be compelled to pay service charges, but not to join, attorneys must both pay and belong to the bar in "integrated states." Therefore Gibson argues that additional First Amendment protection must be given to attorneys since they must join the bar. Amicus notes that it is clearly possible for laypersons to assume that since all attorneys belong to the bar association that all attorneys agree with the partisan political positions taken by the Bar. To avoid such an erroneous conclusion and to protect the "non-associational" rights of dissenters, it is submitted that this Court now establish that the Bar must place a disclaimer on writings and otherwise appropriately note that the position is only that of members who voluntarily agree to contribute to lobbying.

## ARGUMENT

### I.

#### THE FIRST AMENDMENT CONTROLS THE CALIFORNIA LEGISLATURE'S IMPOSITION OF FEES REQUIRED TO PRACTICE LAW SO — LONG AS THE FEES ARE USED FOR LOBBYING

All of the lower Courts (except *Keller*) which have considered the issue have found that bar dues are analogous to union dues, and in particular union "service charges" paid by those who do not wish to belong to the union, or who disagree with lobbying on political / ideological issues that the union seeks to foster. See: *Gibson v. The Florida Bar*, 798 F.2d 1564(11th. Cir. 1986); *Arrow v. Dow*, 544 F.Supp. 458(D.N.M. 1982); *Romany v. Colegio de Abogados*, 742 F.2d 32(1st. Cir. 1984); *Virgin Islands Bar vs. Government of Virgin Islands*, 648 F.Supp. 170(D. Virgin Islands 1986); *In re The Florida Bar*, 439 So. 2d. 213(Fla. 1983).<sup>1</sup>

1. The Florida Supreme Court correctly recognized that the First Amendment and the *Abood* line of cases governed the collection and expenditure of bar dues, but incorrectly found the lobbying that the Florida Bar engaged in was within the limits on such lobbying. CF: *The Florida Bar, Re: Thomas Schwartz*, Case No. 70,702, \_\_\_\_\_ So. 2d \_\_\_\_\_ (Fla. 1989)10-26-89, reproduced in appendix page 1.

The Florida Supreme Court has recently handed down its opinion in *The Florida Bar, Re: Thomas Schwartz*, Case No. 70,702, 10-26-89, Reproduced in Appendix 1, which opinion can be fairly characterized as bereft of First Amendment analysis, save the dissent. However, this opinion does not recede from or overrule *In Re the Florida Bar*, 439 So.2d 213(Fla. 1983) or *Florida Bar Re: Amendment to Rule 2-9.3*, 526 So. 2d 688(Fla. 1988) which did recognize the applicability of *Abood* and other First Amendment cases to bar dues. These decisions correctly decided this issue, since for constitutional purposes, however it may be chartered, an organization to which a person must pay and must join as a precondition of exercising the fundamental right to pursue his chosen, lawful, occupation is nevertheless bound to observe an individual's constitutional rights. Such a requirement creates an infringement on the First Amendment rights "not to associate," "not to speak" and "not to be compelled to pay even 'three pence' to support an ideological cause." The record in this case, as the decision in the *Gibson* case, is replete with proof that the Bar has, and will continue, to lobby on ideological issues beyond those recognized in the various cases as being within the limited scope of appropriate ideological activity. Similarly, The Florida Bar has taken positions which were determined to be by the Eleventh Circuit beyond the limited scope for the use of compulsory dues for lobbying. The Florida Bar has taken positions inter alia, on the regulation of child care centers,



"tort non-reform," opposing changes in the state sales tax, among others. *Gibson v. The Florida Bar* 798 F.2d at 1564. California seeks to distinguish its bar regulation from that of the other jurisdictions by noting that the California legislature has approved the Bar's use of compulsory fees for lobbying. The reasoning that the California Supreme Court used to justify the lobbying by the California Bar is specious and has already been adversely decided by such cases as *Ellis v. Brotherhood*. The core holding, made over twenty years ago and repeatedly reaffirmed by such cases as *Aboud* is that although a legislature and by analogy a Court acting in an administrative capacity can regulate professions and require payment of "service charges" such charges cannot include the payment of monies used for ideological activities over dissent. If the Congress of the United States, (*International Associations of Machinists v. Street*, 367 U.S. 740(1961); and the Michigan legislature (*Aboud v. Detroit Board*, 431 U.S. 209(1977), the Illinois legislature (*Chicago Teacher's*, 475 U.S. 292(1986)) can not do so, neither can the California legislature.

As this Court noted in *Brotherhood of Railroad Trainmen v. Virginia*. 377 U.S. 1(1964):

Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a state cannot ignore the rights of individuals secured by the Constitution. at 377 U.S. page 6.

This Court has considered "bar admissions" cases on many occasions. Gibson urges that what a Bar association, whether created by a legislature or by a Court, cannot do during the process of admitting one to the Bar, it further cannot do in setting dues or establishing requirements to retain the ability to practice law.

It is apodictic that a state may not require an individual to waive one constitutional right as a precondition to exercising another constitutional right. California's rules appears to require that attorneys totally surrender the First Amendment right "not to associate" and freedom from being forced to make "compelled contributions" to ideological causes. As stated by this Court in *Baird v. State Bar of Arizona*, 401 U.S. 1 at U.S. 8, "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character." (emphasis supplied).

In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232(1957), this Court held:

A state can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for find-



ing that he fails to meet these standards, or when their action is invidiously discriminatory. *Schware*, 353 U.S. at 239. (Citations omitted.)

Thus, by equal force of logic a state cannot require that an attorney in order to retain membership in the Bar, subscribe to and make involuntary financial contributions to support ideological causes with which the attorney may disagree.

The First Amendment's protection of association prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. Similarly, when a state attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourages citizens from exercising rights protected by the Constitution. When a state seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. *Baird v. Arizona*, 401 U.S. 1(1971) at 6-7.

For this reason alone the decision of the California Supreme Court was in error, and should be reversed with directions to find that the California legislative scheme is forbidden by the First Amendment rights recognized in *Abood* and such cases as *Gibson v. The Florida Bar*.

## II.

### ATTORNEYS HAVE THE SAME CONSTITUTIONAL RIGHTS AS THOSE IN OTHER FIELDS OF ENDEAVOR

In many ways the practice of law is a different sort of calling than other professions. Since attorneys have such a close connection with the justice system, this court has in dicta and otherwise recognized that there are reasons to distinguish lawyers from other occupational groups. Thus, attorneys may be called upon to perform pro bono service, and have an obligation to do so. The idea that a pipefitter or electrician could be compelled by the state body regulating him or her to perform free work would most likely be struck down as "involuntary servitude" or perhaps as the taking of property without compensation and due process.

At the same time that the craft of legal advocacy is unlike other occupations, it is for First Amendment purposes the same as other professions. In cases such as *Branti v. Finkel*, 445 U.S. 507(1980) this court has held that being employed by the state as an attorney is not "confidential" employment that would permit the imposition of a political test for employment. If the state cannot hire or discharge attorneys based on their political beliefs it is equally clear that a state cannot condition membership in the Bar on making enforced political contributions.

It is submitted that attorneys who are forced to join and to pay fees to a Bar Association, even if the same is approved by a state legislature, should have the same constitutional rights as teachers and the other occupations previously ruled upon. To rule otherwise would be tantamount to declaring that the regulation of attorneys has no constitutional limits — a proposition that this Court has again and again rejected.

For the reasons stated, the lower Court should be reversed.

### III.

#### THE PRACTICE OF LAW IS PART OF INTERSTATE COMMERCE, AND THE STATES CANNOT CONDITION THE RIGHT FOR A QUALIFIED INDIVIDUAL TO PRACTICE LAW ON A WAIVER OF FIRST AMENDMENT RIGHTS

Attorneys engage in interstate commerce, both by representing non-residents of the states where they may practice, and perhaps by suing non-residents. In addition, attorneys also use the means of interstate commerce such as the telephones, mails and airlines. As society becomes more mobile, the number of individuals holding multiple bar memberships increases, as does the number of attor-

neys practicing in more than one jurisdiction. The Florida Bar, with a membership of approximately 40,000 has over 10,000 out of state members.

This Court has determined that practicing law, provided that one is otherwise qualified by education or other fitness requirements, is a "fundamental right" see *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274(1985) for the purposes of the privileges and immunity clause.

The practice of law has been found by this Court to impact upon interstate commerce; and in fact, the legal profession as a whole is engaged in interstate commerce. As this Court noted in *Goldfarb v. Virginia State Bar*, 421 U.S. 773(1975) the "activities of lawyers play an important part in commercial intercourse" (at U.S. page 788.) A state may not precondition the privilege of engaging in interstate commerce on a waiver of federal constitutional rights. *Terral, Secretary of State of Arkansas v. Burke Construction*, 257 U.S. 529(1922). "There are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. State of New Jersey*, 385 U.S. 493(1967) at 500. The majority opinion of the California Supreme Court attempts to distinguish this case from the other bar dues cases because the California legislature has

determined that the Bar may lobby. Indeed the California legislature has done so; but it is still an unconstitutional coercion of a waiver of fundamental rights and privileges.

The right for an otherwise qualified person to practice law may not be denied in the absence of a "substantial reason." *Supreme Court of N.H. vs. Piper*, 470 U.S. 272(1985) at 277. Each case that has considered the issue has found that there is no "substantial reason" to override the First Amendment in regard to union or bar dues used for ideological purposes, save *Keller*.

Accordingly, the California Supreme Court's finding that there is no constitutional barrier to the exaction of service fees from attorneys when the fees are then used to fund ideological lobbying should be reversed.

#### IV.

#### THE APPROPRIATE REMEDY IS A POSITIVE CHECKOFF SYSTEM

*Chicago Teachers v. Hudson*, 475 U.S. 292(1986) established if it is permissible for a state to require that individuals join a particular organization as a requirement of employment, that the First Amendment limits the exaction of dues, over dissent, for ideological activity unrelated to the permissible central purpose of the organization. Further, *Chicago Teacher's* also established that the least

restrictive means are required to be used, since the payment implicates the First Amendment. "By allowing the union shop at all, we have already countenanced a significant impingement on First Amendment Rights." *Ellis v. Railway Clerks*, 466 U.S. 435(1984) at 455-456. "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activity." *Abood* at 431 U.S. 237.

This Court has already rejected "refund procedures" as being inadequate and constitutionally infirm. The means which is the least restrictive is a positive checkoff, whereby the member of the Bar desiring to contribute to lobbying separately approves the expenditure.

For example:

Bar dues:	\$200.00
Total dues:	\$200.00
Voluntary donation for lobbying:	\$50.00
	_____ Yes _____ No
Total remitted:	\$ _____

This means is far less chilling on the potential exercise of rights than is a system which first charges the fee and then allows a "deduction" or other systems.



The Florida Bar's recent regulations on the use of dues for ideological lobbying (which lobbying has now degenerated into taking positions on the dog bite law, federal products liability statutes, and lobbying against making it a "major crime" (sic) to fail to bring a child back on time from visitation) were adopted in response to the decision of the Eleventh Circuit in *Gibson v. The Florida Bar*. The observation that the rule change was caused by Gibson's federal suit is contained in the opinion of the Florida Supreme Court itself, 526 So. 2d 688 (Fla. 1988), adopting new legislative lobbying rules. Amicus suggests that this is an example of an unconstitutional, unduly restrictive system.

Rule 2.92 of the *Bylaws of the Florida Bar* provides in part:

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in *The Florida Bar News*, in the issue immediately following the board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of

the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objection, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting members or to refer the action to arbitration. [Subparts relating to arbitration omitted]

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the board of governors within forty-five (45) days of its construction.

(4) In the event the arbitration panel orders a refund, the Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

The Florida Bar's procedure adopted by the Florida Supreme Court after *Chicago Teachers*, as well as its decision in *The Florida Bar, Re: Thomas R. Schwartz*, Case No. 70,702, 10-26-89, \_\_\_\_ So. 2d. \_\_\_\_, (Fla. 1989) illustrates the need for this Court to clearly establish a "bright line" rule that mandates what procedure is required as a remedy in First Amendment — bar dues matters.

It is respectfully submitted that the *Chicago Teacher's* opinion requires an advance reduction, together with an escrow should there be a dispute as to the correct amount of the deduction. To limit litigation as to remedy and to provide guidance to the lower Courts, it is respectfully requested that the Court now find that a positive checkoff is the minimum required. Such rule would have the advantage of limiting the need for serial re-appeals, as has been the case in *Gibson v. The Florida Bar* to determine the correctness of remedies adopted once the First Amendment is found to be implicated by lobbying done by the bar association or other entity.

The infringement of First Amendment rights is an irreparable injury. The provision by this Court of specific guidance as to remedy will shorten such litigation, thus lessening any injury which parties may suffer. This Court is respectfully requested to rule on this issue in this case as there is significant litigation involving remedy currently pending in the lower Courts that such guidance will materially aid and since, as is argued in point V, attorney's associational rights suffer a greater impact than that of other occupational groups.

**TO MINIMIZE THE FIRST AMENDMENT  
INJURY, A DISCLAIMER SHOULD BE  
MANDATED BY THIS COURT**

As noted in the opinion by the California Court of Appeals, KELLER suffered two distinct injuries. The first is the compelled subsidization of the ideological positions of the California State Bar, the second is being forced to "add his voice" to the California State Bar. In short, being required to join the organization, unlike other occupational groups who only must pay non-ideological "service" charges creates a second injury.

Unlike the other First Amendment / compulsory contribution litigation the Courts to date appear to require that attorneys both pay "service charges" and join integrated Bars. This Court has permitted compelled payment in the past, but only in the special area of attorneys has this Court permitted the additional First Amendment injury of compelled association — that is, joining the organization is also compelled. See *Lathrop v. Donohue*, 367 U.S. 820(1961).

This issue was not decided in the initial First Amendment challenge to bar membership, *Lathrop v. Donohue*. There have been challenges to such membership requirements in recent times, see *Levine v. Heffernan*, 864 F.2d

457(7th Cir. 1989). In such challenges the Bar has prevailed. Assuming *arguendo* that this Court would decide that Bar membership can be compelled, it would then have permitted a great diminution of First Amendment rights. However, there is no compelling state interest in misleading members of the public into believing that all attorneys agree with the positions that the Bar takes. Since a large intrusion is apparently appropriate, a clearly larger degree of protection should be provided to the dissenting attorney. Such protection at a minimum would reduce the risk that the public might think that the ideological positions advocated by the Bar are in fact those of all the attorneys. Given that the Court is being asked by this amicus and petitioner to extend First Amendment protections to attorney's bar dues, the Court should also address the rights of dissenters, albeit members, to be able to disclaim the positions taken by the Bar in this manner. Thus the Bar should be mandated to place a warning or disclaimer on written material which it circulates noting that the opinion is not that of all the attorney's in the State, and in other advocacy that the Bar also make known the fact that there are dissenters, who are not being represented by the Bar. Such a rule protects attorneys from having the Bar's views wrongfully attributed to them and from being obligated to speak to make their disagreement known. Requiring such a disclaimer will avoid compelling the Bar members to speak (a right recognized to

arise out of the First Amendment) and place the burden on the appropriate party, namely the Bar which insists on lobbying.

---

### CONCLUSION

For the reasons stated the decree of the California Supreme Court should be vacated with instructions to provide appropriate First Amendment protection to KELLER.

Dated: November \_\_, 1989

HERBERT R. KRAFT  
1020 E. Lafayette St. Ste. 210  
Tallahassee, Florida 32301  
(904) 877-7139  
Counsel of record for Amicus, Gibson



## APPENDIX

No. 70,702

In The

Supreme Court of Florida

[October 26, 1989]

THE FLORIDA BAR  
Re: THOMAS R. SCHWARZ

This is a continuation of *The Florida Bar re Schwarz*, 526 So.2d 56 (Fla. 1988), on the issue of what lobbying activities of The Florida Bar are permissible. As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation.

In the original *Schwarz* opinion, we referred this matter to the Judicial Council for its comments and recommendations. The Council conducted public hearings on the subject. In its report, the Council first concluded that The Florida Bar could constitutionally engage in activities directed toward the administration of justice and the advancement of the science of jurisprudence. The report then stated:

The integrated bar offers specialized skills, training, education, and experience with which to serve in an advisory function to the various branches of state government. The Council submits that the advice of the Bar is important to the legislature's deliberations within areas pertaining to the administration of justice. These issues may frequently be technical and complex and have effects not otherwise contemplated by the legislation. It appears that the Bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the courts and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters. To prohibit such communication would work a grave disservice to the people of this state and would infringe upon the free speech of the great majority of the state's attorneys. The Florida Bar has a reputation of pursuing improvements in the administration of justice and science of jurisprudence. The relative weight to be accorded these compelling interests appears to be of such great importance as to fully justify the relatively insignificant intrusion occasionally experienced by dissenting members of the Bar.

*Judicial Council of Florida, Special Report to the Florida Supreme Court on Legislative Activities of The Florida Bar 6-7 (Dec. 1988) (on file with the Florida Supreme Court) [hereinafter Special Report on Legislative Activities].* In seeking to define the administration of justice and the advancement of the science of jurisprudence, the Council recommended that the following subject areas be recognized as clearly justifying legislative activities by the Bar:

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
- (3) increasing the availability of legal services to society;
- (4) regulation of attorneys' client trust accounts; and
- (5) the education, ethics, competence, integrity, and regulation as a body, of the legal profession.

*Special Report on Legislative Activities*, supra, at 9. The Council also recommended that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically identified areas:"

- (1) That the issue be recognized as being of great public interest;
- (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
- (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Thereafter, we entertained comments in response to the report and heard oral argument on the subject. Upon consideration, we have concluded that the Council's recommendations are well taken.

The Florida Bar was integrated by this Court in *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. 1949). Justice Terrell, writing for the majority, defined the integrated bar "as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obliged to bear his portion of the responsibility." *Id.* at 904. He further stated that integration "provides a fair and equitable method by which every lawyer may participate in and help bear the burden of carrying on the activities of the bar instead of resting that duty on a voluntary association composed of a minority membership." *Id.*

As noted by Justice Terrell:

Bar integration grew from a felt necessity for an organization that could speak for the profession in esse. It is not a compulsory union but a necessary one to secure the composite judgment of the bar on questions involving its duty to the profession and the public . . . .

. . . . The assault on our institutions which the bar is expected to take the leading role in challenging also requires the full manpower of the bar. We do not think bar integration would be worth the candle as a specific for unethical conduct, but as a means of giving the bar a new and enlarged concept of its place in our social and economic pattern . . . .



Id. at 908 (emphasis added).

In 1969 this Court denied a petition seeking to prevent the Board of Governors of The Florida Bar from lobbying for the adoption of the proposed revision of the Florida Constitution. *In re Florida Bar Board of Governors Action*, 217 So.2d 323 (Fla. 1969). In a concurring opinion, Justice Hopping succinctly observed:

Since the inception of The Florida Bar, the Board of Governors has faced up to its professional responsibility of acting in the spirit of public service and has prepared and advocated adoption by the State Legislature of numerous enactments, including the *Mechanics' Lien Law*, the *Uniform Commercial Code*, the *Public Defenders' Act*, the law providing for filing of administrative rules in the Office of the Secretary of State, and major reforms in the substantive law of this State. It has sponsored adoption by the Legislature and the electorate of Florida, several constitutional amendments including the amendment creating the District Courts of Appeal and the Judicial Qualifications Commission. It has consistently advocated in the Legislature various improvements in the judicial system. Some of these matters were directly related to the administration of justice, some were totally unrelated to the administration of justice, and others were "political" in nature, using the word "political" in its broad sense as pertaining to the organization or administration of government.

Id. at 324 (Hopping, J., concurring).

In 1983 this Court denied a petition seeking to amend the integration rules to prevent the Board of Governors from engaging in any political activity on behalf of The

Florida Bar. *In re Amendment to Integration Rule of The Florida Bar*, 439 So.2d 213 (Fla. 1983). In reaching our conclusion, we pointed out that:

[P]etitioners are made cognizant of the fact that any attorney "is still free to voice his own views on any subject in any manner he wishes. He can do this even though such views be diametrically opposed to the position taken by the unified bar of his state." *In re Unification of the New Hampshire Bar*, 109 N.H. 260, 266, 248 A.2d 709, 713 (1968). This may take the form of working within The Bar itself or its committees or it may be through external means. But he is never forced to adhere to or proclaim any political view or engage in any personally-repugnant political activity

Id. at 215.

The California Supreme Court recently passed on the lobbying authority of its state bar which levies membership dues without the possibility of partial rebate. Reasoning that the words "advancement of the science of jurisprudence" and "improvement of administration of justice" should be read broadly in the context of lobbying activities, the court held that the bar was authorized to comment generally upon proposed legislation. *Keller v. The State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), cert. granted, \_\_\_ S. Ct. \_\_\_ (Oct. 2, 1989). While the decision was broader than the one we reach today, we find most pertinent the following observation of the California court:



Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems."

Id. at \_\_\_, 767 P. 2d at 1030-31, 255 Cal. Rptr. at 552 (citation and footnote omitted).

Several portions of the *Rules Regulating The Florida Bar* also support our conclusion. Thus, rule 1-2 states:

The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

Rule 2-3.2 of the *Rules Regulating the Florida Bar* further provides:

Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:

....

(c) Establish, maintain and supervise:

....

(4) A program for providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law.

Most significantly, rule 2-9.3 of the *Rules Regulating The Florida Bar* specifies in part:

#### **RULE 2-9.3 LEGISLATIVE POLICIES**

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

This rule insures that The Florida Bar will take a legislative position only after first independently focusing on the question of whether the subject matter is one in which the organized bar should become actively involved. In reaching this determination, the Board of Governors should refer to the criteria set forth in this opinion.

However, we also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar. In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court.

In *The Florida Bar re Amendment to Rule 2-9.3*, 526 So.2d 688 (Fla. 1988), we approved an amendment to the *Rules Regulating The Florida Bar* to provide the mechanism for a lawyer who objects to legislative positions taken by The Florida Bar to obtain a partial rebate of bar dues. As part of the process, The Florida Bar is required to publish notice of adoption of legislative positions in *The Florida Bar News* in the issue immediately following the board meeting at which the positions are adopted. In this manner, lawyers are alerted to the legislative positions being taken by The Florida Bar and by registering their objections they may be relieved of paying for their share of the expense attributable to the advocacy of the legislative positions with which they disagree. Consistent with the response filed by The Florida Bar in this action, we ask the Board of Governors to submit proposed amendments to this rule which will make clear that the

Bar carries the burden of proof in such proceedings and providing that the names of objecting bar members, at their option, be kept private.

We approve the recommendations of the Judicial Council and adopt them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar.

It is so ordered.

EHRlich, C.J., and OVERTON, SHAW, BARKETT  
and KOGAN, JJ., Concur

McDONALD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE  
REHEARING MOTION AND, IF FILED,  
DETERMINED.

McDONALD, J., dissenting.

I would limit the lobbying activities of The Florida Bar to the five subject areas which the Judicial Council recognized as "clearly justifying legislative activities" by the bar.

While there is some question on portions of the five subjects that the council finds clearly justified, the overwhelming view is that it is appropriate for The Florida Bar to participate in legislative activities in these designated



areas. Few disagree that these areas fall within the stated purpose of the mandated membership of The Florida Bar. On the other hand, though supported by the majority of the board of governors of The Florida Bar, the council's suggestion that the bar may lobby on issues of great public interest and in matters that lawyers are especially suited to and that affect the rights of those likely to come into contact with the judicial system has drawn serious comments and criticism. Some suggest that these criteria are so broad as to be a complete exception to any set of principles. I agree with this.

What distinguishes The Florida Bar from most other organizations is that all lawyers licensed in Florida must belong to it in order to practice their profession. It is this compulsory membership requirement that presents the strongest obstacle to the bar's discretionary lobbying under discussion. Many lawyers, because of their clients' interests or personal predilections, are in disagreement with positions of The Florida Bar on substantive issues and yet are compelled to be a member of an association espousing causes contrary to their beliefs. This presents some first amendment implications. Even without this concern, it appears to be that, except for matters directly attributable to the purpose of The Florida Bar, it is unwise and improper to compel membership and extract dues for causes or political goals antithetical to the beliefs or interests of individual members. In those matters falling out-

side the direct stated purpose of The Florida Bar it is better to leave lobbying activities to voluntary bar groups such as sections, political action committees, and the like. The lobbying activity of The Florida Bar should be restricted to the five "clearly justified" areas described in the council's report.

The majority does recognize that before taking legislative action it is incumbent on the board of governors first to find that the subject matter is one in which the organized bar should become actively involved. That decision should be determined on whether the proposed action comes within the definition of the stated purposes of The Florida Bar and as restricted by the five clearly defined areas.

I heartily approve of the concept that ready access to this Court be provided for a speedy resolution of issues questioning the propriety of the bar's lobbying decisions. I trust that the board will act with such circumspection that such challenges will be few and without merit. This will be true if lobbying activities not clearly within the stated purposes of The Florida Bar are left with individual sections, or special groups. No restrictions extend to individual members of the bar; restrictions do and should extend to activities by or in the name of The Florida Bar.



Original Proceeding - The Florida Bar

Thomas R. Schwarz, in proper person, Lauderhill,  
Florida, for Petitioner

Joseph W. Little, Gainesville, Florida; Ben L. Bryan, Jr.  
of Fee, Bryan, & Koblegard, P.A., Ft. Pierce, Florida; and  
Henry P. Trawick, Jr., Sarasota, Florida

Responding to Report

Rutledge R. Liles, President, Jacksonville, Florida;  
Stephen N. Zack, President-elect, Miami, Florida; John  
F. Harkness, Jr., Executive Director, John A. Boggs,  
Director of Lawyer Regulation, and Paul F. Hill, General  
Counsel, Tallahassee, Florida; and Barry Richard of  
Roberts, Baggett, LaFace, & Richard, Tallahassee,  
Florida,

for The Florida Bar, Respondent

15  
No. 88-1905

Supreme Court, U.S.

FILED

DEC 15 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

EDDIE KELLER, *et al.*,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, *et al.*,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of California

**AMICUS CURIAE BRIEF OF THE STATE BAR OF  
MICHIGAN AND THE SOUTH CAROLINA BAR  
IN SUPPORT OF RESPONDENTS**

OF COUNSEL:

WADE H. LOGAN, III  
President, South Carolina Bar  
P.O. Box 858  
Charleston, SC 29402  
(803) 723-2000

MICHAEL FRANCK\*  
MICHAEL J. KARWOSKI  
State Bar of Michigan  
306 Townsend  
Lansing, Michigan 48933  
(517) 372-9030

\*Counsel of Record  
for *Amicus Curiae*

Date: December 16, 1989

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS .....	1
STATEMENT OF THE CASE.....	6
SUMMARY OF ARGUMENT.....	6
ARGUMENT .....	7
I. THE TEST TO DETERMINE CONSTITUTIONALITY IN "NEGATIVE" FIRST AMENDMENT CASES REQUIRES A BALANCING OF THE INJURY TO THE INDIVIDUAL AGAINST THE GOVERNMENT INTEREST IN THE COMPELLED ACTIVITY .....	7
II. USE OF COMPELLED DUES TO FURTHER LEGISLATIVE ADVOCACY BY A UNIFIED BAR RESULTS IN SOME INFRINGEMENT OF A MEMBER'S FIRST AMENDMENT RIGHTS..	8
III. THE INFRINGEMENT OF THE MEMBER'S FIRST AMENDMENT RIGHTS IS RELATIVELY MINIMAL.....	9
IV. THE STATE INTEREST IN PROMOTING THE ADMINISTRATION OF JUSTICE AND ADVANCEMENTS IN JURISPRUDENCE OUTWEIGHS THE INJURY TO THE RIGHTS OF THE INDIVIDUAL RESULTING FROM THE USE OF A PORTION OF COMPELLED DUES TO SUPPORT LEGISLATIVE ADVOCACY .....	10
CONCLUSION .....	14



## TABLE OF AUTHORITIES

## Page

## CASES

<i>Aboud v Detroit Board of Education</i> , 431 US 209 (1977) .....	11, 13
<i>Falk v State Bar of Michigan</i> , 418 Mich 270, 342 NW2d 504 (1983) .....	9, 13
<i>Goldfarb v Virginia State Bar</i> , 421 US 773 (1975) .....	12
<i>Hoover v Ronwin</i> , 466 US 558 (1984) .....	12
<i>International Association of Machinists v Street</i> , 367 US 740 (1961) .....	11
<i>Lathrop v Donohue</i> , 367 US 820 (1961) .....	9
<i>Levine v Heffernan</i> , 864 F2d 457 (7 Cir 1988), cert den, 58 USLW 3187 (October 3, 1989) .....	9
<i>PruneYard Shopping Center v Robins</i> , 447 US 74 (1980) .....	7, 9, 10
<i>Railway Employees Department v Hanson</i> , 351 US 225 (1956) .....	8, 11
<i>West Virginia State Bd of Education v Barnette</i> , 319 US 624 (1943) .....	7, 9
<i>Wooley v Maynard</i> , 430 US 705 (1977) .....	7, 9

## STATUTES AND RULES

Mich. Comp. Laws Sec. 600.901 .....	1
Mich. S. Ct. R. Concerning the State Bar of Mich., Rule 1 .....	2
Mich. S. Ct. R. Concerning the State Bar of Mich., Rule 2 .....	2

## TABLE OF AUTHORITIES - Continued

## Page

Mich. S. Ct. R. Concerning the State Bar of Mich., Rule 4 .....	3
S.C. Sup. Ct. Rule 48(A), (B), (C)(1), and (D) .....	2
S.C. Sup. Ct. Rule 48(C)(2) .....	4

No. 88-1905

---

In The

Supreme Court of the United States

October Term, 1989

---

EDDIE KELLER, *et al.*,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, *et al.*,

*Respondents.*

---

On Writ Of Certiorari To The  
Supreme Court Of California

---

AMICUS CURIAE BRIEF OF THE STATE BAR OF  
MICHIGAN AND THE SOUTH CAROLINA BAR  
IN SUPPORT OF RESPONDENTS

---

INTEREST OF AMICUS

The State Bar of Michigan is a public body corporate; its membership consists of all persons who are now and may be hereafter licensed to practice law in the State of Michigan. Mich. Comp. Laws Sec. 600.901;<sup>1</sup> Rules of the

---

<sup>1</sup> Mich. Comp. Laws Sec. 600.901: "The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of

(Continued on following page)

Supreme Court Concerning the State Bar of Michigan, Rules 1 and 2.<sup>2</sup> The South Carolina Bar is an organization of all persons who are licensed to practice law in South Carolina, created by and with purposes and duties established by the Supreme Court of South Carolina.<sup>3</sup> All

---

(Continued from previous page)

Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as 'attorneys and counselors,' or 'attorneys at law,' or 'lawyers.' No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto."

<sup>2</sup> Rule 1. STATE BAR OF MICHIGAN. "The State Bar of Michigan is the association of the members of the bar of this State, organized and existing as a public body corporate pursuant to powers of the Supreme Court over the bar of the State. The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State."

Rule 2. MEMBERSHIP. "Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules. . . ."

<sup>3</sup> S.C.Sup.Ct.R.48. SOUTH CAROLINA BAR. "(A) Name. There is hereby created and established an organization to be known as the South Carolina Bar.

"(B) Purpose. The purposes of the organization shall be to uphold and defend the Constitution of the United States and the Constitution of the State of South Carolina; to protect, and maintain respect for, representative government; to continually

(Continued on following page)

active members of the State Bar of Michigan are required to pay dues pursuant to Rule 4, Supreme Court Rules Concerning the State Bar.<sup>4</sup> All members of the South

---

(Continued from previous page)

improve the administration of justice throughout the State; to require the highest standards of ethical and professional conduct, and uphold the integrity and honor of the legal profession; to advance the science of jurisprudence; to promote consistent high quality of legal education and legal services to the public; to apply the knowledge, experience and ability of the legal profession to the promotion of the public good; to encourage goodwill and respect for integrity and excellence in public service among the members of the legal profession and the public; to perform any additional purposes and duties assigned to it by the Supreme Court of South Carolina; to promote and correlate such policies and activities of the Bar organization as fall within these purposes in the interest of the legal profession and of the public.

"(C) Duties and Powers. (1) The duties of the South Carolina Bar shall be to faithfully carry out its stated purposes as set forth in these rules as may be amended from time to time, with such powers as shall be reasonably necessary and proper for the carrying out of these purposes, including the power to adopt, and amend as necessary, the By-Laws by which it shall be governed, to establish classification of memberships, to recommend amendments or additions to these rules and to the Constitution approved by this Court to be effective upon formation of the South Carolina Bar, and to recommend changes in the license fees to be charged the members thereof. (2) . . .

"(D) Membership. No person shall engage in the practice of law in the state of South Carolina who is not licensed by this Court and a member in good standing of the South Carolina Bar except as otherwise provided in the rules of this Court."

<sup>4</sup> Rule 4. MEMBERSHIP DUES. "(a) An active member's dues for each fiscal year (October 1 through September 30),

(Continued on following page)



Carolina Bar are subject to the payment of annual license fees pursuant to the South Carolina Supreme Court Rule 48(C)(2),<sup>5</sup> and all categories of membership are required to pay annual license fees except the categories of "Senior Members" and "Retired Members."

---

(Continued from previous page)

payable at the State Bar's principal office by October 1 of each year, are \$200. However, for the fiscal year of admission, dues are \$100 for a member admitted between April 1 and September 30.

"(b) Dues notices must be sent to all active members before September 20. A 10 percent late charge is added to a dues payment postmarked after November 30. The State Bar must send a written notice of delinquency (by registered or certified mail to the last recorded business address) to a member who fails to pay his dues by November 30. If the dues and the late charge are not paid within 30 days after the notice is sent, the individual is suspended from active membership in the State Bar. If an individual is not subject to a disciplinary order and the suspension is for less than 3 years, he is automatically reinstated on the payment of dues and late charges owing from the date of his suspension to the date of his reinstatement. If the suspension is for 3 years or more, the individual must also apply for recertification under Rule 8 for the Board of Law Examiners.

"(c) . . .

"(d) . . .

"(e) All dues are paid into the State Bar treasury and constitute a fund to pay expenses authorized by the Board of Commissioners."

<sup>5</sup> S.C.Sup.Ct.R.48. SOUTH CAROLINA BAR. "(C) Duties and Powers. (1) . . .

"(2) The annual license fee for active members who have been members of the Bar for five (5) years, or more, shall be

(Continued on following page)

The issue before the Court of concern to the State Bar of Michigan and the South Carolina Bar is the extent to which the mandatory dues of a unified bar can be used to support the organization's limited advocacy in furtherance of its state-designated purpose to promote improvements in the administration of justice and advancements in jurisprudence.

In furtherance of that mandate, the State Bar of Michigan and the South Carolina Bar have established committees and sections whose jurisdictions involve the ongoing review of the relevant substantive law. They evaluate proposals for change in the law and occasionally recommend to the policy-making bodies of the state bar those they believe should be supported or resisted. Sometimes they themselves develop proposed statutes and court rules and recommend that the state bar advocate their enactment. Positions ultimately adopted by the state bar's policy-making entities are advocated to the governmental bodies which have jurisdiction. These advocacy

---

(Continued from previous page)

One Hundred and Forty (\$140.00) Dollars per year. The license fee for all other members shall be in such lesser amounts as may be provided for in the By-Laws of the South Carolina Bar. The license fee shall be payable on or before January 1st of each year to the Treasurer of the South Carolina Bar, provided, however, that in the year 1975 all dues shall be due and payable on or before April 1, 1975. All such license fees shall be handled pursuant to the procedures set forth in Section 40-5-30, South Carolina Code of Laws, 1976. All income and assets, other than such license fees, may be handled separately by the South Carolina Bar, as prescribed in its Constitution and By-Laws."

activities on the part of the State Bar of Michigan and the South Carolina Bar may be directly affected by the Court's decision in this case.

The State Bar of Michigan and the South Carolina Bar file this *amicus curiae* brief in support of Respondents State Bar of California, *et al.* Consent of the parties has been obtained and is on file with the Clerk of the Court.

---

### STATEMENT OF THE CASE

This action is brought by licensed California attorneys to enjoin the use of mandatory bar dues to fund legislative advocacy and other activities Petitioners label "ideological and political."

---

### SUMMARY OF ARGUMENT

The issue before the Court is the constitutionality of the use of a portion of a unified bar member's mandatory dues to fund the organization's advocacy activities in furtherance of its state-designated purpose. The test for determining constitutionality in these circumstances requires a balancing of the degree of the infringement of the individual member's rights against the importance of the state's interest in the compelled activity. Applying this test to the facts of this case demonstrates that the infringement is relatively minimal while the state's interest is great. Therefore, the state action passes constitutional muster.

---

### ARGUMENT

#### I. THE TEST TO DETERMINE CONSTITUTIONALITY IN "NEGATIVE" FIRST AMENDMENT CASES REQUIRES A BALANCING OF THE INJURY TO THE INDIVIDUAL AGAINST THE GOVERNMENT INTEREST IN THE COMPELLED ACTIVITY

This case involves the claim that First Amendment rights are infringed when a portion<sup>6</sup> of mandatory unified state bar dues are used to fund limited advocacy by the organization because some lawyer members may prefer not to speak at all or may favor a different message.

This Court has addressed claims of such so-called "negative" First Amendment rights in various settings. In *West Virginia State Bd. of Education v. Barnette*, 319 US 624 (1943), the Court held that the First Amendment rights of school children were impermissibly infringed by a school rule "compelling speech" through the daily recitation of a specific message, the pledge of allegiance. In *Wooley v. Maynard*, 430 US 705 (1977), the Court held that the First Amendment rights of automobile owners were impermissibly infringed by state law compelling the display of an automobile license plate which communicated a specific slogan with which the owner disagreed. In *PruneYard Shopping Center v. Robins*, 447 US 74 (1980), the Court held that the First Amendment rights of shopping center

---

<sup>6</sup> The member's pro rata share of the funds devoted directly to legislative advocacy by the State Bar of Michigan in its current fiscal year amounts to less than 3% of dues. Approximately 3% of license fee revenues to the South Carolina Bar were devoted directly to legislative advocacy during fiscal year 1988-1989.

owners were not impermissibly infringed by allowing citizens to demonstrate on shopping center property because there was little likelihood that the views of the demonstrators would be attributed to the store owners. In *Railway Employees Department v. Hanson*, 351 US 225 (1956), the Court held that a federal law compelling financial support of a collective bargaining unit by all who share in the benefits of its advocacy does not impermissibly infringe the First Amendment.

In these "negative" First Amendment cases the Court has determined the constitutionality of the challenged state action by balancing the severity of the injury to the individual against the magnitude and importance of the government interest sought to be served by the requirement or regulation. The Court has not applied the strict scrutiny test developed in other First Amendment cases involving government action prohibiting speech.

Application of the balancing test involves a three-step inquiry. (1) Does the government action infringe a protected interest of the individual member? (2) If so, what is the severity of the member's injury, how strongly is the individual linked to the compelled expression? (3) Does the government interest outweigh the injury?

## II. USE OF COMPELLED DUES TO FURTHER LEGISLATIVE ADVOCACY BY A UNIFIED BAR RESULTS IN SOME INFRINGEMENT OF A MEMBER'S FIRST AMENDMENT RIGHTS

This Court has held that a lawyer may be compelled to be a member of a state bar and to pay dues to support bar activities (other than legislative activities with respect

to which the record was inadequate), noting that this compulsion has no meaningful consequence other than the payment of dues since the member is free not to participate in any of the organization's activities. *Lathrop v. Donohue*, 367 US 820 (1961); see also, *Levine v. Heffernan*, 864 F.2d 457 (7 Cir. 1988), *cert den*, 58 USLW 3187 (October 3, 1989). But because the use of compelled dues to further legislative advocacy by a unified state bar involves financial support for a form of expression, the First Amendment rights of an objecting member are implicated. *Falk v. State Bar of Michigan*, 418 Mich 270, 342 NW2d 504 (1983).

## III. THE INFRINGEMENT OF THE MEMBER'S FIRST AMENDMENT RIGHTS IS RELATIVELY MINIMAL

Unlike the specific preordained messages the state required the individual to convey in *West Virginia State Bd. of Education v. Barnette*, *supra*, (the pledge of allegiance), and in *Wooley v. Maynard*, *supra*, ("Live Free or Die"), the lawyer member of a unified bar is not compelled to personally advocate any message. The individual lawyer member remains free to advocate whatever position the lawyer personally favors and to appear before the very same governmental entities to which the organization advocates its positions and oppose them.

Nor is the lawyer member personally identified with the message communicated by the state bar in the course of its advocacy. Just as this Court concluded no reasonable person would ascribe the views of demonstrators to the owners of a shopping center on whose premises the advocacy took place, *PruneYard Shopping Center v. Robins*,



*supra*, no reasonable person aware of the position advocated by the organization would conclude that it is the view held by every individual member. In *PruneYard*, the Court rejected the shopping center owners' claim that their First Amendment rights of nonassociation were violated by the peaceful distribution of flyers on their property, noting that the content of the speech was not prescribed by the government and that the owners were free to disavow the views expressed. Similarly, the member of a unified bar remains free to disavow, and indeed to oppose, the positions advocated by the organization.

The support of legislative activity through a portion of compelled dues by the member of a unified bar is content neutral. No position or message is preordained. In fact, the lawyer member is free to participate in the election of representatives to the governing bodies of the organization who determine its positions, as well as in the process by which those bodies determine the positions which are to be advocated. The lawyer member may even seek election to the unified bar's policy-making entities.

#### IV. THE STATE INTEREST IN PROMOTING THE ADMINISTRATION OF JUSTICE AND ADVANCEMENTS IN JURISPRUDENCE OUTWEIGHS THE INJURY TO THE RIGHTS OF THE INDIVIDUAL RESULTING FROM THE USE OF A PORTION OF COMPELLED DUES TO SUPPORT LEGISLATIVE ADVOCACY

This Court has held in circumstances in which the opportunities for the individual to be heard are far more limited than those present here that requiring financial

support for organizational advocacy to further important state interests does not violate the First Amendment rights of the payors. In reliance upon the governmental interest in labor peace, the Court has upheld the constitutionality of an "agency shop" arrangement wherein every public sector employee is compelled to financially support the collective bargaining activities of the union certified to represent the employees. These bargaining activities intended to influence government policy unquestionably implicate First Amendment rights. The positions advocated by the union may not be shared by those compelled to financially support their assertion and may even directly conflict with their personal best interests.<sup>7</sup> Moreover, the non-member employee has no vote in electing the union representatives who will conduct the bargaining process; has no formal standing to be heard concerning the union's bargaining position; cannot seek election or appointment to the bargaining team; has no direct access to the governmental entity to advocate personal positions; and has no right to vote on the ratification of any contract proposal that results from the negotiation process. Nevertheless, compelled funding of these activities has been held to pass constitutional scrutiny. *Abood v. Detroit Board of Education*, 431 US 209 (1977); *Railway Employees Department v. Hanson*, *supra*; *International Association of Machinists v. Street*, 367 US 740 (1961).

<sup>7</sup> The employee could, for example, be compelled to financially support negotiations seeking an in-county residency requirement for employment, even though the employee lives outside the county. Or the compelled financial support could be used to negotiate the exchange of a fringe benefit which is particularly useful to the employee for one which is not.

The governmental interests in improving the administration of justice and advancing the jurisprudence of the state is at least as great as the interest in labor peace. These are fundamental interests of government; indeed, they are the essence of government. Lawyers are the laborers who further that interest.

The unique role that lawyers play and the consequent interest in their regulation by the state has been noted by this Court:

"The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically have been 'officers of the court.' "

*Goldfarb v. Virginia State Bar*, 421 US 773, 792 (1975). No other trade or profession is as "essential to the primary governmental function of administering justice." *Hoover v. Ronwin*, 466 US 558, 569, n.18 (1984).

Many states have concluded that promoting improvements in the administration of justice and advancements in jurisprudence require the compelled support of all members of their bars.<sup>8</sup> Justice Boyle of the Michigan Supreme Court noted:

"There can be little doubt that the government has an interest in receiving the input of the State Bar into the legislative process. The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing, and interpreting the law.

<sup>8</sup> Of the 50 states, the District of Columbia and the Commonwealth of Puerto Rico, 34 have unified bars most of which have statements of purpose relating to support for improvements in the administration of justice and the law.

"In this sense, the State Bar is quite different from the labor union involved in *Abood*, *supra*. It is true that the government might have a keen interest in the legislative participation of a labor union in specialized areas of the law touching directly on the field of employment of the union members or on the area of collective bargaining. But lawyers are involved with the law in almost all its forms. Therefore, their input is of broader interest to the Legislature.

"In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice it offers the Legislature. Certainly, the Legislature is greatly aided by the collective wisdom of the practitioners who make up the Taxation Section of the bar when it revises state taxation provisions. Similarly, the input of the Criminal Law Section is invaluable to the Legislature in its task of revising Michigan's Criminal Code."

*Falk v State Bar of Michigan*, 418 Mich 270, 297, 342 NW2d 504, 514 (1983).

The state's conclusion that compelled financial support of advocacy activities seeking to promote improvements in the administration of justice and advancements in jurisprudence by the members of its bar furthers its vital interest is surely as constitutionally tolerable as the similar conclusion that compelled support of collective bargaining activities furthers the state's interest in labor peace. That is particularly so, given the state's even more fundamental interest in the administration of justice and the evolution of its jurisprudence and the less intrusive infringement of the First Amendment rights of individuals compelled to contribute to the unified bar.

### CONCLUSION

For the reason stated, the judgment below should be affirmed.

OF COUNSEL:

WADE H. LOGAN, III  
President, South Carolina Bar  
P.O. Box 858  
Charleston, SC 29402  
(803) 723-2000

Respectfully submitted,

MICHAEL FRANCK\*  
MICHAEL J. KARWOSKI  
State Bar of Michigan  
306 Townsend  
Lansing, Michigan 48933  
(517) 372-9030

\*Counsel of Record  
for *Amicus Curiae*

Date: December 16, 1989



No. 88-1905

16

Supreme Court, U.S.

FILED

DEC 18 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

KELLER, *et al.*,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
California Supreme Court

**BRIEF OF THE AMERICAN BAR ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

L. STANLEY CHAUVIN, JR.\*

President

American Bar Association

CARTER G. PHILLIPS

MARK D. HOPSON

LOREEN M. MARCIL

750 North Lake Shore Drive

Chicago, Illinois 60611

(312) 988-5215

*Counsel for the*

*American Bar Association*

December 18, 1989

\* Counsel of Record

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT..	4
ARGUMENT .....	5
I. STATES HAVE A LEGITIMATE INTEREST IN ADVANCING THE ADMINISTRATION OF JUSTICE THROUGH STATE BAR ACTIVI- TIES .....	7
II. THE STATE INTEREST IN BAR ACTIVITY ADVANCING THE ADMINISTRATION OF JUSTICE IS DIFFERENT THAN THE STATE INTEREST AT ISSUE IN <i>ABOOD</i> ....	12
CONCLUSION .....	15

## TABLE OF AUTHORITIES

CASES	Page
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977) .....	<i>passim</i>
<i>Falk v. State Bar of Michigan</i> , 418 Mich. 270, 342 N.W.2d 504 (S. Ct. Mich. 1983), <i>cert. denied</i> , 469 U.S. 925 (1984) .....	12, 14
<i>Gibson v. Florida Bar</i> , 798 F.2d 1564 (11th Cir. 1986) .....	12, 13
<i>Hollar v. Virgin Islands</i> , 857 F.2d 163 (3d Cir. 1988) .....	12
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961) .....	<i>passim</i>
<i>Levine v. Wisconsin Supreme Court</i> , 679 F. Supp. 1478 (1988), <i>rev'd sub nom., Levine v. Hefferman</i> , 864 F.2d 457 (1988), <i>cert. denied</i> , 110 S. Ct. 204 (1989) .....	2, 9
<i>Machinists v. Street</i> , 367 U.S. 740 (1961) .....	6
<i>Railway Employees' Dept. v. Hanson</i> , 351 U.S. 225 (1956) .....	5, 6

## OTHER AUTHORITIES

<i>ABA Bar Activities Inventory</i> (Dec. 1987) .....	10
<i>ABA, Model Rules of Professional Conduct</i> (1983) .....	8
<i>ABA, Model Code of Professional Responsibility</i> (1981) .....	7, 8
<i>ABA, Rules of Procedures of the House of Delegates, Constitution and Bylaws</i> (1989-90) .....	9
<i>ABA, Special Coordinating Committee On Professionalism, Report to the House of Delegates</i> (1988) .....	2, 3
<i>Report of the American Bar Association Commission on Professionalism</i> (1986) .....	2
<i>Rhode Island Bar Association By-Laws, Article II</i> .....	9
<i>State Bar of Arizona By-Laws, Article II</i> .....	9
<i>State Bar Association of North Dakota Constitution and By-Laws, Article II</i> (Amended July 1, 1989) .....	9

## TABLE OF AUTHORITIES—Continued

	Page
<i>State Bar of Michigan Bar Rules I</i> .....	9
<i>Washington State Bar Association By-Laws, Article I, Section 1</i> .....	9
<i>Wisconsin Bar Bulletin</i> (Feb. 1987) .....	11
<i>Wisconsin Bar Bulletin</i> (Mar. 1987) .....	11



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---

No. 88-1905

---

KELLER, *et al.*,  
v. *Petitioners,*

STATE BAR OF CALIFORNIA, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the  
California Supreme Court

---

**BRIEF OF THE AMERICAN BAR ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

---

**INTEREST OF AMICUS CURIAE**

The American Bar Association ("ABA") is a private voluntary, professional organization of approximately 363,000 lawyers throughout the United States. In many respects, the ABA serves as the national representative of the legal profession. The ABA's governing bodies are comprised of lawyers in their individual capacities and as representatives of state bar associations, ABA entities and other affiliate legal organizations.

One of the principal goals of the ABA is to promote the administration of justice. In furtherance of this goal, the ABA has consistently called upon its members and the legal profession as a whole to serve the public and the courts. It has encouraged its members through the Rules of Professional Conduct and other policies to provide assistance to governmental entities and to the public

at large in improving the administration of justice and access to the legal system. The ABA has sections, committees and other entities dedicated to studying and taking action to carry out these goals. In 1985, the ABA formed a Commission on Professionalism to consider the role of the profession in this regard. The 1986 Report of the Commission concluded, *inter alia*, that "lawyers should help promote the enactment of legislation that is in the public interest and should encourage consideration of the potential effect of legislation on the courts." *Report of the American Bar Association Commission on Professionalism*, 32-33 (1986).

Subsequently, the ABA established a Special Coordinating Committee on Professionalism. Its mandate provided that it should monitor and implement state and local bar participation in professionalism activities, including activities promoting the administration of justice. To that end, the Committee proposed, and the ABA House of Delegates adopted, a resolution in August 1988 which provided that "lawyers . . . individually and through their appropriate professional organizations, should actively support the enactment of and amendments to federal, state and local legislation designed to improve the administration of justice and the functioning of the legal system."<sup>1</sup> ABA, Special Coordinating Committee

<sup>1</sup> The report attached to the 1988 resolution noted that some courts had placed restrictions or conditions on particular legislative activity by certain mandatory bars. As an example, it cited the recently announced decision of a federal district court in Wisconsin in *Levine v. Wisconsin Supreme Court*, 679 F. Supp. 1478 (1988), *rev'd sub nom., Levine v. Heffernan*, 864 F.2d 457 (1988), *cert. denied*, 110 S. Ct. 204 (1989). The ABA report expressly recognized that the resolution was not intended to override any such judicially imposed limitations or conditions on particular legislative activity by certain mandatory bars. The report states in this regard: "Clearly it is intended that those professional organizations which may lawfully and properly do so should actively support legislation beneficial to the judicial system. However, it is also clear that the resolution is not directed to *those* integrated bar associations which

on Professionalism, *Report to the House of Delegates* (1989).

The interest of the ABA in this case stems from its belief that the public and state interest in a high quality, fair and efficient system of justice is a compelling one, and that it is the professional responsibility of lawyers actively to support and promote judicial, legislative and private action toward that end. Lawyers, by reason of education and experience, are especially qualified to evaluate the legal system, identify deficiencies and initiate corrective measures. Bar associations provide the organizational framework for lawyers to undertake these tasks. Therefore, the states, in all branches of government, legitimately look to bar associations to assist in promoting public policy by eliciting from the bar its views concerning the impact of a wide range of public issues on the administration of justice. The ABA believes that the relief sought by the petitioners in this case will unduly curtail the states' ability to encourage integrated bar associations to provide vital information to public policymakers.

The ABA wishes to present its views to the Court because it believes that this case raises issues of major significance to the legal profession as a whole. The ABA also believes that the Court, in its consideration of the question presented, might benefit from the ABA's perspective on the role and responsibility of the legal profession and the organized bar in society, particularly with regard to such issues as the administration of justice and the accessibility of the legal system.<sup>2</sup>

may not properly or lawfully engage in *particular* legislative activity." ABA, Special Coordinating Committee on Professionalism, *Report to the House of Delegates* (1988). (Emphasis added.)

<sup>2</sup> Pursuant to Rule 36 of the Rules of this Court, the *amicus* ABA has obtained the written consent of the parties to the filing of this brief, and copies of the letters of consent have been filed with the Clerk of the Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from a challenge by California attorneys to the use of compelled dues by the State Bar of California to support certain bar activities with which they disagree. The activities at issue include the filing of *amicus curiae* briefs, lobbying activities, adoption of certain positions by the State Bar of California's Conference of Delegates and activities in support of the retention of judges, all of which petitioners characterize as the "advancement of a political and ideological agenda" by the State Bar of California in violation of petitioners' First Amendment rights of speech and association. Pet. 4

Petitioners seek to have this Court adopt a rule of law that would give dissenting members of an integrated bar association a veto power over any public policy activities of the association. Unquestionably, *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), suggest that dissenting members of mandatory associations have a First Amendment-protected interest in prohibiting the use of their dues for causes that they do not support. Petitioners overlook, however, the important public policy considerations that exist in the *bar association* context that justify distinguishing bar associations from the labor union at issue in *Abood*.

Unlike a labor union, or other compelled-membership organization, a bar association's participation in debates on issues of law and public policy—even if characterized as "political" or "legislative" or "ideological"—is central, not incidental, to the bar's charter. Bar associations have uniquely valuable contributions to make to the administration of justice and legal reform, in legislative, judicial and administrative forums. Indeed, such endeavors to promote the administration of justice are part of the bar's ethical obligation and are an essential part of the bar's commitment to promote professionalism.

The governmental interests in utilizing the organized bar's knowledge and experience on public policy questions support the bar's participation in activities that are "germane" to its charter. See *Abood*, 431 U.S. at 219 (quoting *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 235 (1956)). The question whether a particular bar activity is "germane" to the bar's purposes can only be answered with reference to the state's definition of its integrated bar's role and responsibilities, not by any *de novo* judicial interpretation of the "proper" role of the bar.

## ARGUMENT

This Court previously has considered the relationship between the First Amendment and the creation and operation of an integrated bar association, which required the mandatory payment of dues by its members. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), a member of the Wisconsin Bar challenged the integration of the bar and its use of compelled dues to support legislative activities with which the appellant disagreed as a violation of both his right of free association and his right of free speech.

This Court held that integration of the bar promoted the state's interest in "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal services available to the people of the State . . . ." *Id.* at 843. Moreover, "in order to further the State's legitimate interest in raising the quality of professional services," the Court concluded that the state "may constitutionally require that the costs of improving the profession" be shared by the legal profession, "even though [the bar association] also engages in some legislative activity." *Id.* In "light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues," the Court was "unable to find any impingement upon protected rights of asso-



ciation." *Id.*<sup>3</sup> In that case, however, a majority of the Court declined to reach the appellant's challenge to the legislative activities of the integrated bar on free speech grounds, holding that "on this record we have no sound basis for deciding the appellant's constitutional claim, insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes." *Id.* at 845.

Subsequently, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court addressed the question of whether a labor union's use of compelled dues of public school teachers to promote ideological causes violated the free speech rights of teachers who objected to such use of their dues. In that case, the Court held that the employee's right to freedom of speech protected by the First and Fourteenth Amendments "prohibit[s] the [union and school board] from requiring any of the [teachers] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235.

In so holding, the Court made it clear that such restrictions on use of dues applied only to "ideological activities unrelated to collective bargaining." 431 U.S. at 236. The Court reaffirmed its prior holding in cases such as *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1965), that "important government interests . . . presumptively support the impingement" on First Amendment-protected interests that result from the use of compelled union dues for activities "germane" to the union's statutory purposes. 431 U.S. at 225; see *id.* at 235.

<sup>3</sup> Justice Brennan authored the plurality opinion for four members of the Court. Justice Harlan, joined by Justice Frankfurter, concurred in the judgment, but would have reached the appellant's "free speech" arguments and would have rejected them. *Id.* at 850. Justice Whittaker also separately concurred in the result. Justices Douglas and Black dissented.

The ABA's concern in this case lies not in debating whether *Abood* should apply to the State Bar of California in particular, given its somewhat unique governmental status and relationship. The ABA, instead, is concerned with emphasizing that, as a general matter, the states have a legitimate concern in advancing the proper and efficient administration of justice through diverse bar association activities. Policymakers at all levels of government have come to depend upon and expect lawyers, through their bar associations, to assist them in understanding the implications of their proposed policies and legislative actions on all aspects of the legal system. The states' interest in receiving such assistance is substantial. Accordingly, the states should be able to rely on the organized bar to take the lead in providing specialized advice and opinions on all matters of public policy "germane" to the bar's charter.

#### I. STATES HAVE A LEGITIMATE INTEREST IN ADVANCING THE ADMINISTRATION OF JUSTICE THROUGH STATE BAR ACTIVITIES.

Lawyers are in a unique position vis-a-vis the law and the legal system. Through their education and professional experience, they are intimately familiar with both and are ideally situated to identify deficiencies and potential areas for improvement. The ABA standards governing lawyer conduct have long recognized this fact. For many years, Canon 8 of the predecessor ABA *Model Code of Professional Responsibility* provided that "A lawyer should assist in improving the legal system." The aspirational ethical considerations of the ABA *Model Code* recognized that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." ABA, *Model Code of Professional Responsibility* EC 8-9 (1981). The ethical considerations further exhorted lawyers to participate in proposing and supporting legislation and pro-

grams to improve the judicial system; to encourage simplification of laws and repeal or amendment of outmoded laws; and to obtain appropriate changes in the law to prevent unjust results.<sup>4</sup>

In introducing the *Model Rules of Professional Conduct* in 1983 (a revision of the prior *Model Code of Professional Responsibility*), the ABA delegated generally aspirational provisions from the rules since they were not subject to disciplinary enforcement. Nonetheless, the ABA considered the lawyer's obligation to participate in legal reform activities as being of such overarching importance that it retained a single aspirational standard in its Model Rule 6.1 relating to the public service responsibilities of lawyers. Rule 6.1 provides in relevant part as follows: "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by . . . service in activities for improving the law, the legal system or the legal profession . . . ." Further, the Preamble to the Model Rules, which sets forth the guiding principles of the legal profession, gives special emphasis to the lawyer's opportunity to seek improvement of the law as follows:

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education . . . . A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

ABA, *Model Rules of Professional Conduct*, Preamble ¶ 5 (1983).

<sup>4</sup> These aspirational ethical considerations are still in effect in the following 15 jurisdictions' codes of professional conduct: Alabama, Alaska, Colorado, the District of Columbia, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, New York, Ohio, South Carolina, Tennessee, Vermont, and Virginia.

Given the profession's ethical obligation to address such public issues, it is entirely appropriate for state legislatures and courts to call upon the legal profession to advise them of ways to improve the administration of justice and to assist in public education about the law and the legal system. The means by which the states have traditionally called upon the resources of the bar is through the state bar associations that have been created and maintained through legislative or judicial acts. Today, of the 52 jurisdictions (including the 50 states, the District of Columbia and Puerto Rico), 33 are integrated.<sup>5</sup> The constitutions and by-laws of the bar associations provide that advancing the administration of justice and promoting reform in the law and judicial procedure are among their chief objectives.<sup>6</sup>

<sup>5</sup> The 33 integrated jurisdictions are Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Hawaii (as of November 1, 1989), Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington (State), West Virginia and Wyoming.

The 19 jurisdictions that are not integrated are Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont and Wisconsin. In Wisconsin, the integrated bar is operating as a voluntary bar association pending the outcome of the *Levine v. Heffernan* case.

Four of the 33 integrated jurisdictions also have voluntary jurisdiction-wide bar associations: District of Columbia, North Carolina, Virginia and West Virginia.

<sup>6</sup> See, e.g., State Bar of Arizona By-Laws, Article II; State Bar Association of North Dakota Constitution and By-Laws, Article II (Amended July 1, 1989); Rhode Island Bar Association By-Laws, Article II; Washington State Bar Association By-Laws, Article I, Section 1; State Bar of Michigan Bar Rules I. The ABA constitution similarly specifies its purpose "to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions." ABA, Rules of Procedure of the House of Delegates, *Constitution and Bylaws*, Article I, § 1.2 (1989-90).



Myriad activities fall within the state bar associations' mandate to advance the administration of justice. Such activities may be conducted solely by or within the membership of the bar or they may be conducted in conjunction with the courts and legislatures. Often, they directly involve judicial procedure or administration of the courts. For example, based upon a survey of state and local bar activities conducted by the ABA in 1987, 50 percent of all state bars conducted ongoing organized activities to review court practices and procedures and consider ways in which to reduce civil court delay. Sixty-four percent conducted activities to promote alternative dispute resolution. Thirty-eight percent conducted written surveys of lawyers on the qualifications of candidates for judicial office. Sixty-one percent undertook organized activities regarding judicial salaries. *ABA Bar Activities Inventory*, Table 3 (Dec. 1987).

Examples of some specific initiatives in this area include: support by the Virginia Bar of legislation concerning merit selection of appellate judges and pay increases for state judges; assistance by the State Bar of South Dakota in the revision of pattern jury instructions; and the filing by the State Bar of California of an *amicus curiae* brief (addressing the appearance of non-attorneys in court on behalf of corporations), which is one of the specific bar activities complained about here. App. E-11.

Advancing the administration of justice goes beyond statutory reform and includes direct activities to improve access to the system of justice, as well. State bars are a critical resource in addressing this problem. According to the 1987 ABA survey, 64 percent of state bars operated pro bono programs with staff support. Those programs provided legal service to the poor, the elderly, the handicapped and other disadvantaged groups. Forty-one percent of state bars compiled data on the number of

hours spent by members on pro bono matters. State bars also have encouraged private bar participation in state public defender programs.

Another way in which state bars act to advance the administration of justice is by participation in the revision of complex or outmoded statutory or regulatory schemes. In such instances, the expertise of lawyers who work closely with the laws at issue is invaluable.<sup>7</sup> Thus, in 1985, the Wisconsin Bar supported revision by the legislature of state homicide statutes, in order to clarify confusing language and achieve conformity with recent judicial interpretations. *Wisconsin Bar Bulletin* 23 (Feb. 1987). In addition, it supported reform of the state's corporation statute to bring it more in line with the ABA's model corporation act. *Wisconsin Bar Bulletin* 10 (Mar. 1987). Similarly, in the area of trusts and estates, the Virginia Bar lobbied in support of the Uniform Transfers to Minors Act and, in the area of real estate, it lobbied in support of the Uniform Federal Lien Recordation Act.

In each of these instances, the state benefited substantially from the collective legal knowledge of the bar and its expertise concerning various matters affecting the law and the legal system. Thus, allowing the bar to use its resources to promote such "public" law activities constitutes an important interest which members of this Court and other courts have recognized. For example, Justice Brennan, in *Lathrop*, stated that "the bulk of

<sup>7</sup> In recognition of this fact, the ABA maintains the following sections and divisions which focus on substantive areas of law: Administrative Law and Regulatory Practice, Antitrust Law, Business Law, Criminal Justice, Family Law, International Law and Practice, Labor and Employment Law, Natural Resources, Energy and Environmental Law, Patent, Trademark and Copyright Law, Public Utility Law, Real Property, Probate and Trust Law, Taxation, Tort and Insurance Practice, and Urban State and Local Government Law.



State Bar activities serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of legal services available to the people of the State. . . ." 367 U.S. at 843. "It cannot be denied" that such a goal is a "legitimate end of state policy." *Id.*

Similarly, Justice Harlan, in his concurrence in *Lathrop*, found a "most substantial state interest" in "having the views of the members of [the] Bar 'on measures directly affecting the administration of justice and the practice of law.'" *Id.* at 864. Lower federal and state courts, including courts that have followed *Abood* as petitioners urge here, also have recognized that promoting and improving the administration of justice is a state interest of the highest order and, accordingly, an appropriate object of integrated bar activities. *Hollar v. Virgin Islands*, 857 F.2d 163, 170 (3d Cir. 1988); *Gibson v. Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986); *Falk v. State Bar of Michigan*, 418 Mich. 270, 342 N.W.2d 504, 511 (S. Ct. Mich. 1983), *cert. denied*, 469 U.S. 925 (1984).

## II. THE STATE INTEREST IN BAR ACTIVITY ADVANCING THE ADMINISTRATION OF JUSTICE IS DIFFERENT THAN THE STATE INTEREST AT ISSUE IN *ABOOD*.

As a point of departure in analyzing the state interest, this Court in *Abood* did not absolutely prohibit the use of compelled dues for political or ideological activity. To the contrary, it prohibited the use of dissenting members' dues for such activity when it was not "germane" to the state's interest in promoting collective bargaining. 431 U.S. at 235. In fact, the Court expressly acknowledged that certain "germane" activities necessarily would be viewed as political or ideological. *Id.* at 236.<sup>8</sup> It recog-

<sup>8</sup> The Court noted that "a written collective-bargaining agreement prescribing the terms and conditions of public employment

nized the "difficult problems in drawing lines," but did not ban "political" or "ideological" activities simply for that reason (*id.*) as petitioners urge this Court to do here. See Pet. Br. 26.

Moreover, "political" and "ideological" activity, particularly if those terms are used in reference to or interchangeably with legislative activity, as petitioners employ them in this case, is unquestionably "germane" to the state interest in advancing the administration of justice. Lower courts applying *Abood* have noted this distinction:

[T]he union's need to undertake political activities is more of a necessary consequence of the collective bargaining system than an independent, important interest. On the other hand, the integrated Bar has been recognized by the State as possessing special training and experience with which to serve in an advisory function to the various branches of state government and to help "improve the administration of justice." While this advisory function is not the Bar's only function or even its most important function, the Bar's capacity and responsibility to advise and educate gives rise to a compelling governmental interest distinct from that of . . . [a] union.

*Gibson v. Florida Bar*, 798 F.2d at 1568. The state interest in having the organized bar participate in the legislative or other "political" process—particularly with regard to legal reform—is based upon the unique relationship of lawyers to the legal system and the law. As a result of this relationship, discussed in Part I, state bar associations have a broad mandate to address public concerns. In contrast to labor unions, their purpose extends far beyond advancing the cumulative economic interests of their members. Thus, at least in this context,

may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236.

political activity is more appropriately undertaken by a bar association than a union.

The Supreme Court of Michigan expressly recognized this fact in considering "political activity" by its integrated bar:

The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing and interpreting the law. In this sense, the State Bar is quite different from the labor union involved in *Abood*. It is true that the government might have a keen interest in the legislative participation of a labor union in specialized areas of the law touching directly on the field of employment of the union members or on the area of collective bargaining. But lawyers are involved with law in almost all its forms. Therefore, their input is of broader interest to the Legislature. In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature. Certainly, the Legislature is greatly aided by the collective wisdom of the practitioners who make up the Taxation Section of the bar when it revises state taxation provisions. Similarly, the input of the Criminal Law Section is invaluable to the Legislature in the tasks of revising Michigan's Criminal Code.

*Falk v. State Bar of Michigan*, 342 N.W.2d at 514. Such an analysis of appropriate bar association activities is consistent with this Court's decision in *Lathrop*, which acknowledged the legitimacy of legislative activity by the integrated bar.<sup>9</sup> 367 U.S. at 843. Indeed, Justice Harlan,

<sup>9</sup> As an initial matter, state bar activity traditionally has been supervised by the states. See *Lathrop*, 367 U.S. at 849. The logic behind this tradition is clear and applies here. Each state is in the best position to determine the role and responsibilities that its bar should fulfill. That determination will vary from state to state. Similarly, each state is in the best position to determine the appropriate limitations, if any, upon the activities of its bar. That

in his concurring opinion described "legislative and other programs of law reform" undertaken by the bar as "among the most useful and significant branches of its authorized activities." *Id.* at 848. Thus, this Court should be extremely reluctant to develop a rule of law that would give dissenting members a veto over the ability of bar associations to participate in public efforts towards legal reform and thereby deprive state policymakers of valuable information and insights that the bar is uniquely qualified to provide.

### CONCLUSION

The relief sought by petitioners unduly restricts integrated state bar activities. Its practical effect would be to preclude integrated state bar activity which promotes vital state interests. Accordingly, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

L. STANLEY CHAUVIN, JR.\*

President

American Bar Association

CARTER G. PHILLIPS

MARK D. HOPSON

LOREEN M. MARCIL

750 North Lake Shore Drive

Chicago, Illinois 60611

(312) 988-5215

Counsel for the

American Bar Association

December 18, 1989

\* Counsel of Record

determination will vary, as well. Moreover, limitations are best determined on a case-by-case basis, which is possible if they are left to the states. In this manner, as controversies arise, state courts in conjunction with state bars will decide whether particular activities are germane to the state's interest in advancing the administration of justice.

17  
No. 88-1905

Supreme Court, U.S.

FILED

DEC 18 1989

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,  
*Petitioners,*  
v.

STATE BAR OF CALIFORNIA, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
California Supreme Court

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

MARSHA S. BERZON  
177 Post Street  
San Francisco, CA 94108

LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, DC 20006  
(202) 637-5390



## TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
I. Government Supported Speech Generally .....	2
II. Applying the <i>Abood Standard</i> .....	22
CONCLUSION .....	30

## TABLE OF AUTHORITIES

CASES:	Page
<i>Aboud v. Detroit Board of Education</i> , 431 U.S. 209 (1977) .....	<i>passim</i>
<i>A.L.A. Schecter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935) .....	16
<i>Anderson v. City of Boston</i> , 380 N.E.2d 628 (Mass. 1978), appeal dismissed, 439 U.S. 1060 (1979) ..	9
<i>Arrington v. Taylor</i> , 380 F. Supp. 1348 (M.D.N.C. 1974), aff'd mem., 526 F.2d 587 (4th Cir. 1975) ..	12
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982) .....	5
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982) ....	11, 13, 25
<i>Board of Education v. Barnette</i> , 319 U.S. 624 (1943) .....	7, 10, 14, 15
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980) .....	26
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	8, 11, 13, 14
<i>Cahill v. Public Service Commission</i> , 69 N.Y.2d 265, 506 N.E.2d 187 (N.Y. Ct. App. 1986) .....	12
<i>California Medical Association v. Federal Election Commission</i> , 453 U.S. 182 (1981) .....	14
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986) .....	8, 23
<i>Citizens to Protect Public Funds v. Board of Education</i> , 13 N.J. 172, 98 A.2d 673 (N.J. S.Ct. 1953) .....	10, 18
<i>Communications Workers v. Beck</i> , — U.S. —, 108 S. Ct. 2641 (1988) .....	<i>passim</i>
<i>Consumers Union of United States, Inc. v. California Milk Producers Advisory Board</i> , 82 Cal. App.3d 433 (1978) .....	12
<i>Cornelius v. NAACP Legal Defense &amp; Ed. Fund</i> , 473 U.S. 788 (1985) .....	11, 13
<i>Cumero v. Public Employment Relations Board</i> , 49 Cal.3d 575 (1989) .....	6, 29
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984) .....	5, 22
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....	23
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947) ..	8
<i>FCC v. League of Women Voters of California</i> , 468 U.S. 364 (1984) .....	11, 14, 15, 19

## TABLE OF AUTHORITIES—Continued

	Page
<i>Federal Election Commission v. Massachusetts Citizens for Life</i> , — U.S. —, 107 S. Ct. 616, (1988) .....	14, 26
<i>Federal Election Commission v. National Right to Work Committee</i> , 459 U.S. 197 (1982) .....	26
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978) .....	13, 26
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	5
<i>In Re Integration of Bar</i> , 5 Wis.2d 618 (1958) ....	18
<i>Lathrop v. Donahue</i> , 367 U.S. 820 (1960) .....	17, 18, 30
<i>Machinists v. Street</i> , 367 U.S. 740 (1960) .....	<i>passim</i>
<i>Minnesota State Board v. Knight</i> , 485 U.S. 271 (1988) .....	29
<i>Monitor Patriot Co. v. Roy</i> , 401 U.S. 265 (1971) ..	25
<i>Pacific Gas &amp; Elec. Co. v. Public Util. Comm'n</i> , 475 U.S. 1 (1986) .....	10
<i>Perry Ed. Assn. v. Perry Local Educators' Assn.</i> , 460 U.S. 37 (1980) .....	11
<i>Pipefitters v. United States</i> , 407 U.S. 385 (1957) ..	26
<i>Pruneyard Shopping Center v. Robins</i> , 447 U.S. 74 (1980) .....	10, 15
<i>Railway Employees' Dept. v. Hanson</i> , 351 U.S. 225 (1956) .....	6, 7
<i>Regan v. Taxation With Representation of Wash.</i> , 461 U.S. 540 (1983) .....	11, 12, 13
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982) .....	5
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	17
<i>Roberts v. Jaycees</i> , 468 U.S. 609 (1984) .....	23
<i>San Fran. Arts &amp; Athletics, Inc. v. U.S.O.C.</i> , 483 U.S. 533 (1987) .....	5
<i>Schneider v. Colegio de Abogados de Puerto Rico</i> , 682 F. Supp. 674 (D.P.R. 1988) .....	27, 28
<i>Supreme Court of New Hampshire v. Piper</i> , 470 U.S. 274 (1985) .....	21
<i>United States v. Frame</i> , 885 F.2d 1119 (3rd Cir. 1989) .....	4, 12
<i>Veed v. Schwartzkopf</i> , 353 F. Supp. 149 (D. Neb.), aff'd mem., 478 F.2d 1407 (8th Cir. 1973), cert. denied, 414 U.S. 1135 (1974) .....	12

## TABLE OF AUTHORITIES—Continued

	Page
<i>Webster v. Reproductive Health Services</i> , — U.S. —, 109 S. Ct. 3040 (1989) .....	11
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977) .....	7, 10, 14
<i>Wygant v. Jackson Board of Education</i> , 476 U.S. 267 (1985) .....	6
STATUTES:	
20 U.S.C. § 954 <i>et seq.</i> .....	12
20 U.S.C. § 956 <i>et seq.</i> .....	11
42 U.S.C. § 1861 <i>et seq.</i> .....	11
42 U.S.C. § 29960 .....	12
MISCELLANEOUS:	
A. Bickel, <i>The Least Dangerous Branch</i> (1962)....	25
T. Emerson, <i>The System of Freedom of Expression</i> (1970) .....	25
Jaffe, <i>Law Making by Private Groups</i> , 51 Harv. L. Rev. 201 (1937) .....	17
Liemann, <i>Delegation to Private Parties in American Constitutional Law</i> , 50 Ind. L.J. 650 (1975) .....	17
M. Olson, <i>The Logic of Collective Action</i> (1964)....	16
Schiffrin, <i>Government Speech</i> , 27 UCLA L. Rev. 565 (1980) .....	9, 17, 25
L. Tribe, <i>American Constitutional Law</i> (1988)....	4, 9
M. Yudof, <i>When Government Speaks</i> (1983) .....	11, 25

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")—a federation of 90 national and international labor organizations having a total membership of approximately 14 million working men and women—is filed with the consent of the parties as provided for in the Rules of this Court.

**SUMMARY OF ARGUMENT**

I. We first demonstrate that when the government requires individuals to subsidize the activities of an entity, the nature of the governmental action and its effect on individual rights is the same whether the entity designated to collect and to spend the exacted moneys is a traditional, geographically based governmental entity, an innovative governmental entity composed of and responsive to a non-geographically based group with inherent common interests, or a private entity charged with serving the common interests of a group of individuals. Since there is such a requirement here, the issue is not whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), applies but what the principle stated there entails, both in general and in this case particularly.

II. A. *Abood*, properly understood, simply cabins government expenditures on, or subsidy of, expressive activity, whatever the nature of that expenditure or subsidy, in two very limited respects: First, *Abood* establishes a "germaneness" test limiting the government's ability in all contexts to require that individuals contribute to expressive activities. That standard preserves the ability of traditional, geographically-defined governmental entities to spend tax-derived funds for speech purposes upon the subjects entrusted to that particular entity. And that standard also allows legislatures to devise novel stat-



utory schemes that provide for democratic decisionmaking among groups defined by common interests that are *non-geographical*, such as a common endeavor (*e.g.*, studying at the same university), a common commercial interest (*e.g.*, selling apples or producing beef) or a common occupation (*e.g.*, practicing law or teaching in public schools). Second, *Abood*, and other cases of this Court, erect an *absolute* prohibition upon expending mandated fees of any kind in a partisan fashion upon candidates for elective office.

B. Thus, under *Abood*, the State Bar may use mandatory contributions to fund *any* expressive activities germane to the legislative purposes carried out by the Bar, whether "ideological" or not. And there is no requirement under *Abood* that the legislative purposes be narrowly drawn, or strictly regulatory. An important legislative purpose of California's State Bar Act is to obtain the combined expertise of the State's attorneys on matters relating to the administration of justice and the science of jurisprudence. The challenged activities involving lobbying, the filing of *amicus curiae* briefs, and the Conference of Delegates are constitutional, because these activities relate to the Bar's broad administration of justice functions, and do not entail an impermissible involvement in partisan electoral policies.

## ARGUMENT

### Introduction

This case concerns the petitioners' First Amendment challenge to certain expressive activity of the State Bar of California. In ruling on that challenge, the California Supreme Court held that the State Bar *is an integral part of the State government*. That state law ruling is, of course, authoritative.

The First Amendment—like the balance of the Bill of Rights—was proposed and was made part of the Constitution as a check on the *government*. Indeed, no rule

of constitutional law is more firmly established than that the Bill of Rights applies only to state action and not to private action.

In this litigation, however, the determination that the entity whose expressive activity is alleged to be prohibited by the First Amendment is a *governmental actor* has been held to *defeat* the constitutional claim. According to the California Supreme Court, *because* the State Bar is a governmental entity, the Bar is entitled to exact fees and to spend the moneys so collected free of any First Amendment limitations, although, were the Bar a private entity, the First Amendment's limitations would apply.

The California Court came to this paradoxical conclusion as its reconciliation of two lines of authority in this Court: On the one hand, this Court's jurisprudence indicates that, as general matter, the First Amendment does *not* limit government speech on secular issues of public importance financed through compulsory taxation, and that taxpayers do *not* have any constitutional right to a pro-rata reduction of their taxes because the taxpayers disagree with one or more of the uses to which those taxes are put, expressive or otherwise. On the other hand, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny place *some* limitation, albeit a narrow one, upon the authority of purely private entities to spend fees that individuals are compelled, through any form of state action, to contribute: Such an association may not expend exacted fees "on behalf of political candidates, or towards the advancement of other ideological causes not germane to" the "cause which justified bringing the group together." *See id.* at 222-23 & 235.

The California Court was of the view that these two lines of authority are reconcilable only upon the startling premise that the *more* direct the governmental involvement in collecting compelled payments and expending the resulting fund on expressive activity, the *less* the First Amendment limits those expenditures.

Petitioners' solution to this apparent anomaly—and the solution proposed in the concurring and dissenting opinion below—is to agree with the California Court that governmental entities of *some kinds* are not limited by the First Amendment in their expenditure of exacted payments, collected in the form of taxes, for expressive purposes, but to maintain that *both* private entities and *certain* governmental entities of which the State Bar is one, are subject to limitations of the kind imposed in *Abood*.

On this view, there is a fundamental difference of constitutional dimension between the compulsory payment of taxes to support expressive activity by traditional, geographically-based governmental units and all other forms of governmental compulsion to support expressive activity. The difference does not inhere, however, in the governmental or non-governmental nature of the spending entity, but, instead, upon some critical difference between taxes and other forms of dues and fees that the government requires to be paid. See Petitioners' Opening Brief at 20-23; see also, e.g., Pet. App. A-46—A-50 (Kaufman, J., concurring and dissenting); *United States v. Frame*, 885 F.2d 1119, 1132-33 (3rd Cir. 1989); L. Tribe, *American Constitutional Law* 807-808 n.14 (1988).

We agree with the State Bar that the proffered distinction between taxes and other forms of governmentally-compelled payments for purposes of determining whether First Amendment interests are implicated by the compelled payment will not bear close analysis. And we agree as well that the Bar is permitted by the Constitution to spend funds derived from exacted fees upon all the activities the Bar is authorized to engage in by the applicable state law as construed by the California Court.

We propose, however, an alternative analytical framework for reaching these eminently sensible results that is consistent with the basic understanding that the First Amendment regulates government action. In essence, we submit that all the various forms of governmental support for expressive activity and for association to en-

gage in expressive activity, implicate the same First Amendment interests, while the result of balancing those interests against the proffered governmental justifications for compelled financial support of expression will differ depending upon the strength of that justification.

### I. Government Supported Speech Generally.

A. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). It is equally plain that "[a] government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]'" *San Fran. Arts & Athletics, Inc. v. U.S.O.C.*, 483 U.S. 533, 546 (1987) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)).

Consistent with this understanding of the First Amendment's limited, albeit critical, office in our governmental scheme, this Court's cases on the status of union security agreements (*viz.*, agreements requiring all covered employees to pay dues and initiation fees to the labor organization selected as the exclusive bargaining representative of a particular employee group) turn on the conclusion that the compulsion to pay union dues and fees is a *governmental compulsion*, although the entity spending the fees is private.<sup>1</sup>

<sup>1</sup> In several cases under the Railway Labor Act ("RLA") and National Labor Relations Act ("NLRA"), this Court has held that Congress has, as a *statutory* matter, restricted the expenditure of mandated fees (*Machinists v. Street*, 367 U.S. 740 (1960); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Communications Workers v. Beck*, — U.S. —, 108 S. Ct. 2641 (1988)), and has emphasized that the statutory limitations do not hinge upon "constitutional concerns", but are valid "regardless of whether the negotiation of union security agreements under the [particular statute] partakes



In the RLA cases, although the decision to require a mandatory fee is made by two private entities, a private employer and a union, and although decisions about the expenditure of the mandatory fees are made entirely by a private entity, the union, the state action derives from the RLA's preemption of state law forbidding union security agreements. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956). In the public employee cases, the state action is found in the fact that the compulsory fee requirement is set in part by a governmental entity, the public employer, as one party to a collective bargaining agreement. *Abood*, 431 U.S. at 218 & n.12; *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 n.4 (1985). And under the NLRA, because neither of these circumstances pertain, this Court has explicitly left open the question whether the First Amendment in any way limits the collection or expenditure of mandatory fees under union security provisions. *Communications Workers v. Beck*, *supra*.

Indeed, in *Abood*, *supra*, the major point of disagreement between the majority and the dissenters was whether the nature of the governmental involvement under the RLA, a statute regulating only private employees, and the governmental involvement under a state statute governing the employment of public employees is sufficiently different to mandate a different result under the First Amendment in the latter situation, more restrictive of the right of a private entity to spend mandated fees. The dissent maintained that

---

of governmental action." *Communications Workers v. Beck*, 108 S. Ct. at 2657. Similarly, the California Supreme Court, in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989), recently held, without regard to the First and Fourteenth Amendments, that the California statute governing collective bargaining for educational employees forbids unions operating under that statute to spend compelled fees for "most lobbying and electioneering expenses as well as the costs of recruiting new members." *Id.* at 582.

The arguments we make in this brief do not, of course, directly affect those statutory holdings.

The State in this case has not merely authorized union-shop agreements between willing parties; it has negotiated and adopted such an agreement itself. . . . Accordingly, the Board's collective bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation.

Because neither *Hanson* nor *Street* confronted the kind of governmental participation in the agency shop that is involved here, those cases provide little or no guidance for the constitutional issues presented in this case. [431 U.S. at 253-54.]

The majority, however, found this proposition "somewhat startling." 431 U.S. at 227 n.23. Maintaining instead that the applicable First Amendment principles are triggered by governmental compulsion generally, and do not vary depending upon whether "the governmental action operate[s] less directly", *id.*, the *Abood* majority agreed with Justice Douglas that

Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgement by government, whether directly or indirectly. [*Id.*, quoting *Machinists v. Street*, 367 U.S. at 777 (Douglas, J., concurring).]

Further, the precedent upon which *Abood* placed its main reliance in finding that there are at least some limitations upon the uses to which mandated union fees may be devoted is a case limiting the government's authority to compromise freedom of conscience by compelling allegiance to a governmentally-prescribed message: *Board of Education v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the Court stated that

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. [*Id.* at 642].

See also *Wooley v. Maynard*, 430 U.S. 705 (1977).



*Abood* went on to conclude that an individual's freedom of conscience may, in some circumstances, be compromised not only by requiring the kind of direct, personal affirmation of belief at issue in *Barnette*, but also by requiring an individual "to make . . . [financial] contributions for political purposes. . . ." 431 U.S. at 235. The language in *Abood* to this effect is general; there is nothing in the opinion indicating that the principle derived from *Barnette* applies only when the government compels financial support of a private entity's speech and not when the compelled payment supports governmental speech.

*Abood* and its progeny repeatedly quote James Madison's proclamation that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever", and Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." 431 U.S. at 234 n.31. See also *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.15 (1986).<sup>2</sup> Again, these very general statements of the freedom of conscience ideal on which *Abood* rests make no distinction between government compelled payments to government itself which are used for the support of government expressive activities and government compelled payments to private entities which are used for the entity's expressive activities.

<sup>2</sup> As the context of the Madison and Jefferson statements demonstrates, the form of compelled funding with which the founding fathers were most concerned was the funding of religion. That concern, of course, found expression in the Establishment Clause of the Constitution, a clause with no direct counterpart as to speech in general. See *Buckley v. Valeo*, 424 U.S. at 91-92. Under the Establishment Clause, no distinction is made between mandated direct contributions to religious institutions and mandated contribution through the expenditure of tax-generated revenues for religious purposes. E.g. *Everson v. Board of Education*, 330 U.S. 1 (1947).

Thus, the *Abood* line of cases does not rest, as the California Supreme Court supposed, upon the notion that the First Amendment necessarily places greater restrictions on expenditures of government mandated fees by private entities to finance expressive activities than the Amendment places upon the government when it funds its own speech (a notion that, as we stressed at the outset, would be entirely incompatible with the state action doctrine). Rather, *Abood's* premise is that the government may not escape First Amendment strictures by providing a private entity the means to do what the government may not itself do. *Abood*, in other words, begins the process of ascertaining and articulating the basic First Amendment principles concerning the very limited way in which the Constitution cabins the government's authority to finance expression generally. Accord, L. Tribe, *American Constitutional Law*, 807-808 n.14; Schiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 588-95 (1980).<sup>3</sup>

<sup>3</sup> There is one major way in which the impact of *Abood* differs significantly depending upon whether the entity expending compelled funds is governmental or nongovernmental:

Where the entity is governmental, the authority of that entity to engage in a certain activity at all, expressive or otherwise, is subject to legislative control, and to the strictures of the Constitution. Cf. *Anderson v. City of Boston*, 380 N.E. 2d 628 (Mass. 1978), appeal dismissed, 439 U.S. 1060 (1979) (holding that legislative prohibition upon expenditure of tax-generated funds by a city to propagate views on an initiative measure is valid as protective of the interests of citizens in not funding ideas with which they disagree); Pet. App. A-26 - A-30 (holding that in conducting certain of the protested activities the States Bar "exceeded its statutory authority").

In contrast, where the entity expending mandated fees or taxes is private, the entity has First Amendment interests of its own, which the legislature and the courts are bound to respect; any legislative or constitutional inhibitions upon the expenditure of compelled fees must, therefore, be remedied in a way that does not constrain the ability of the organization to carry on its chosen activities with voluntary funds. *Machinists v. Street*, 367 U.S. at 772-773; *Abood*, 431 U.S. at 238.

The consequence may well be that in the rare case where the complaint upheld is that a governmental entity is spending man-

B. The conclusion that *Abood* states a unitary principle applicable at its broadest level to any and all government actions that enhance speech is reinforced by giving closer consideration to the different ways in which the government supports expression, and to the precise nature of the interference with First Amendment interests worked by requiring monetary support for the resulting speech in each context. As a general matter, there are at least four different ways in which the government may require an individual to contribute money to the propagation of ideas with which the individual may disagree.<sup>4</sup>

First, the government can spend tax-derived funds upon the direct expression of ideas, political or otherwise.<sup>5</sup>

dated fees or taxes in a way that infringes the First Amendment interests of dissenting fee-payers or taxpayers, a simpler remedy than the complicated pro rata reduction used in the union security cases could be devised.

<sup>4</sup> For simplicity sake, we discuss here the circumstances in which the *only* sense in which an individual is being compelled to lend support to the propagation of ideas in which he or she disbelieves is by the payment of money into the fund from which the objectionable expenditure is made, directly or indirectly. There are, as well, other forms of compelled support of expression; for example, those which involve mandatory use of either governmental or private physical property to enhance the speech activity of the government or of private persons. See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (requirement that a shopping center owner permit use of his property by groups wishing to communicate with shoppers); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (requirement that a company permit certain groups to use the company's billing envelope to communicate their views).

<sup>5</sup> E.g., *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 98 A. 2d 673 (N.J. S.Ct. 1953) (circulation of both information upon and governmental entity's opinion upon a school bond election); *Board of Education v. Barnette*, 319 U.S. at 640 (contrasting "[n]ational unity as an end which officials may foster by persuasion", presumably financed by tax revenues, with the direct affirmation of belief involved in that case); *Wooley v. Maynard*, 430 U.S. at 717 (state may communicate "an official view as to

Second, the government can contract with a private entity for the payment of tax-derived funds for a public service that involves expression on the condition that the private party in carrying out that service follow the same line as the government would take.<sup>6</sup>

Third, the government can subsidize private entities speaking on their own behalf, rather than on behalf of the government.<sup>7</sup>

proper appreciation of history, state pride, and individualism . . . in any number of ways").

Many instances of governmental expression on its own behalf upon controversial political issues are so commonplace, and so accepted, that disputes concerning the validity of such expression simply do not arise. For example, the executive branch of government is certainly expected to present its views to the legislature upon questions before the legislature. See generally M. Yudof, *When Government Speaks* (1983).

<sup>6</sup> E.g., *Webster v. Reproductive Health Services*, — U.S. —, 109 S. Ct. 3040 (1989) (conditioning receipt of government funds upon promotion of the government's views about abortion).

<sup>7</sup> E.g., *Regan v. Taxpayers with Representation of Wash.*, 461 U.S. 540 (1983) (tax deduction for lobbying activities of certain private organizations); *Board of Education v. Pico*, 457 U.S. 853 (1982) (selection of books for a public school library); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (government financial assistance to noncommercial, educational broadcasting); *Buckley v. Valeo*, 424 U.S. 7 at 90 et seq. (public funding of presidential election campaigns); see also *id.*, at 93 n.127 ("Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§ 390-299, and preferential postal rates . . . for newspapers. 39 CFR § 132.2 (1975)"); *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1980) (tax-funded internal mail system, available to carry government messages and those of selected private groups); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985) (government-sponsored fund raising campaign, accessible to selected private groups).

Other examples of government subsidy to private groups and individuals for expressive activity include the National Endowment for the Humanities (20 U.S.C. § 956 et seq.), the National Science Foundation (42 U.S.C. § 1861 et seq.) and the National Endowment



And, fourth, the government can require that certain similarly situated individuals pay fees, whether denominated taxes or not, directly to an entity controlled by such individuals collectively and empowered either exclusively, or as part of its activities, to expend funds for expressive activities as determined by the group.<sup>8</sup>

1. The core situation at issue is the one in which the government levies, collects and spends tax revenues. And this Court has repeatedly ruled, albeit without explaining its reasoning in great depth, that as a general matter, the First Amendment does *not* limit the government's authority to expend tax-derived revenues on stating the government's own position on public issues, and on subsidizing the expression of ideas by private entities.<sup>9</sup>

for the Arts (20 U.S.C. § 954 et seq.), all of which operate in large part by providing grants to private individuals and groups for scholarly or artistic work, and the federal Legal Services Corporation, which provides funds for legal advocacy to private nonprofit organizations (42 U.S.C. § 29960).

<sup>8</sup> The obvious examples are the present one, involving an integrated bar association, and the union security arrangements involved in *Abood and Hudson*. See also, e.g., *Consumers Union of United States, Inc. v. California Milk Producers Advisory Bd.*, 82 Cal.App.3d 433, 438 (1978) (noting existence of 92 state boards in California funded through fees imposed upon individuals and groups involved in certain fields of production or trade); *United States v. Frame*, *supra* (beef advertising funded through compulsory fees imposed by the government upon entities involved in the production of beef); *Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974), *aff'd* mem. 526 F.2d 587 (4th Cir. 1975) (speech funded through student activity fee paid by all students at a university); *Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.Neb.), *aff'd* mem. 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) (same). Cf. *Cahill v. Public Service Commission*, 69 N.Y. 9d 265, 506 N.E. 2d 187 (N.Y. Ct. App. 1986) (charitable contributions funded through utility charges).

<sup>9</sup> Where the government is subsidizing the speech of others rather than speaking directly on its own behalf, the First Amendment does place some limits upon the government's discretion to choose among the speakers to be subsidized.

For example, Congress has the power to appropriate money to finance election campaigns according to neutral criteria without permitting "taxpayers to designate particular candidates as recipients of their money." *Buckley v. Valeo*, 424 U.S. at 92. In rejecting the claim that this infringes on the First Amendment rights of taxpayers who do not wish their money to go to a particular candidate, the *Buckley* Court said

The fallacy of appellants' argument is . . . apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object. [*Id.* at 96.]

Moreover, Congress does not run afoul of the First Amendment by subsidizing through a tax deduction lobbying activity by certain private groups but not others. *Regan v. Taxation with Representation of Wash.*, *supra*. Nor do taxpayers have any constitutional right to object to the expenditure of tax funds by private organizations for the purpose of editorializing on publically-funded radio stations:

This argument is readily answered by our decision in *Buckley v. Valeo*, [*supra*]. As we explained in that case, virtually every congressional appropriation will to some extent involve use of public money as to which some taxpayers may object. . . . Neverthe-

Primarily, the government may not, in choosing which groups or ideas to subsidize, "discriminate invidiously in such a way as to 'aim at the suppression of dangerous ideas'". *Regan v. Taxation with Representation of Wash.*, 461 U.S. at 548. See also *Board of Education v. Pico*, 457 U.S. at 871 (plurality opinion) *id.* at 879 (opinion of Blackmun, J.). Cf. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. at 811 (in choosing which organizations to admit to a "nonpublic forum," the government has wide discretion by may not engage in "viewpoint-based discrimination.")

For present purposes, what is significant about these limitations is that they are grounded not in concern for the freedom of conscience of taxpayers but, instead, in the impact of the governmental decision upon need to protect the "public access to discussion, debate and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).



less, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. [*FCC v. League of Women Voters of California*, 468 U.S. at 385 n.16.]

The government may, moreover, "communicate to others an official view as to proper appreciation of history, state pride, and individualism . . . in any number of ways." *Wooley v. Maynard*, 430 U.S. at 717; see also *Board of Education v. Barnette*, 319 U.S. at 640.

As these cases recognize, upon even the briefest consideration it is apparent that where the only sense in which there is a requirement of compelled support for expression is that some small amount of money paid into a general fund will be used for that purpose, the individual making the payment has a most limited First Amendment interest. The interest in contributing money to others for speech-related purposes is "marginal . . . since the expression rests solely on the undifferentiated symbolic act of contributing . . ." and since "the transformation of contributions into political [or ideological] debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. at 20-21.<sup>10</sup>

Further, where the objection is to compelled association or to compelled support of expression *only* in the form of exacted payments to a general fund, "the broader concept of individual freedom of mind" that underlies the First Amendment protection of the right *not* to speak and the right *not* to associate, *Board of Education v. Barnette*, 319 U.S. at 633-34, 642, is implicated only in an attenuated sense. As this Court has observed, "unlike *Wooley*

<sup>10</sup> This Court has in the years since *Buckley* repeatedly recognized that monetary payments for expression, as "speech by proxy," involve only "some limited element of protected speech" *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196 & n.16 (1981) (plurality opinion, cited with approval in *Federal Election Commission v. Massachusetts Citizens for Life*, — U.S. —, 107 S. Ct. 616, 629 (1988)), and has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending," 107 S. Ct. at 629.

*v. Maynard*," where the government sought to require an individual to *directly* facilitate such expression, there "is not a case in which an individual taxpayer is forced in his daily life to identify with particular views . . ." *FCC v. League of Women Voters of California*, 468 U.S. at 385 n.16, where the only connection between an individual and ideas with which he or she disagrees is that the speech in question is funded with a share of the individual's tax payments.

Since there is no such mandatory intimate connection, the government is not directly "invad[ing] the sphere of the intellect and spirit which it is the purpose of the First Amendment to reserve from all official control," *Board of Education v. Barnette*, 319 U.S. at 642. See also *Pruneyard Shopping Center v. Robins*, 447 U.S. at 85-88 (no infringement of right not to speak or not to associate where the only required connection between an individual and the expressive activities of others is use of the individual's property generally open to the public).

2. Mandatory subsidization of speech through general taxes of the kinds involved in the cases just discussed is based on "membership" in a particular geographical unit: As a condition of living in a particular country, state, or city, an individual may be required to assist in financing programs of common interest to the residents of that area, including expressive conduct with which he may disagree. The geographical political subdivision may be a large state with broad authority, or it may be a small town of several hundred people, perhaps, with very limited responsibility in the overall governmental scheme.<sup>11</sup>

<sup>11</sup> The breadth of the common interests in geographically-based governmental units will vary with the geographical and substantive breadth of the unit. Thus, the national government is concerned with the common interest in defense, but, because of substantive determinations made in the Constitution, state governments are not. New York concerns itself with transportation into and within New York, but has no direct role in determining bus routes in California. Public utility districts are concerned *only* with the common needs of the populace they serve for water or electricity,

In addition, some traditional governmental entities funded through taxes are geographically defined but limited in their substantive purview; school boards and other special districts, such as park districts, public utility districts, and transportation districts, exemplify this category.

A geographical definition of commonality is the most concrete, defined as it is by physical boundaries, and the most traditional. But, as Justice Douglas recognized in his concurrence in *Machinists v. Street*, *supra* (upon which the *Aboud* majority relied, 431 U.S. at 223), often "in an industrial society . . . an association with others is compelled by the facts of life," 367 U.S. 740, 775-76 (Douglas, J., concurring). Thus, lawyers in a state, students in a state university, and employees in an industry constitute what social scientists denominate a "latent" group—*viz.*, "a number of individuals with a common interest," M. Olson, *The Logic of Collective Action* (1964) p. 8—whether or not the individuals are bound to a formal organization. By aiding in the expression of the interests and the abilities of a "latent group" through a formal, democratically-organized entity charged with representing the group as a whole—such as an integrated bar association—the government provides the same kind of limited self-determination for subgroups of citizens as a traditional local, geographically based subdivision, with limited but important responsibilities and prerogatives, provides.<sup>12</sup>

and not with other aspects of the lives of the people who live within the district's geographical boundaries.

<sup>12</sup> Certain of the *amici curiae* supporting petitioners appear to contest the government's authority to establish non-geographically based entities for any purpose, contending that the Constitution commands that no governmental powers may be delegated to entities formed along occupational or industry lines. See Brief Amicus Curiae of Trayton L. Lathrop, at 3-6; Brief Amicus Curiae of the National Right to Work Foundation, at 7 n.8, 14-19. For this proposition these *amici curiae* rely on cases as diverse—and as far from the instant case—as *A.L.A., Schechter Poultry Corp. v. United*

Concomitantly, from the point of view of the complaining individual, there is no self-evident difference in principle between the compulsion to pay taxes to a geographically defined governmental entity, where some of the receipts are used for expressive activity with which the individual disagrees, and a government requirement—imposed by a geographically defined governmental entity—to pay fees to an interest-based governmental entity or to a private entity, where the latter engage in expressive activity as one among many activities. In either case, the individual is in some way, albeit a rather removed one, aiding the expression of ideas with which he or she disagrees, and in either case, there is no substantial connection between the individual and the positions he or she would prefer not to support other than the payment into a fund from which the expression is financed. See generally Schiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 588-94 (1980).

In particular, there is no reason to believe that the degree of either actual or perceived identification between compelled taxes or fees and government-assisted speech would necessarily differ according to whether the speaker

*States*, 295 U.S. 495, 537 (1935) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

Justice Harlan, in his concurring opinion in *Lathrop v. Donohue*, 367 U.S. at 854-55, fully exposed the multiple and fatal errors in this line of argument. See also Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937); Liemann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. J. 650 (1975).

In this case, however, the challenge is not to any regulatory powers that the State Bar may have but, instead, solely to the Bar's authority to communicate with those governmental entities that retain traditional governmental authority, principally the legislature and the courts. Petitioner's Opening Brief, at 24. Insofar as the Bar simply communicates its views to other entities with the power to decide issues of law and policy, the Bar is not legislating in any sense whatever, and no delegation concepts pertain. Further, since the decision to exact fees was made by the *State Legislature*, that decision, also, has in no sense been delegated to the Bar.



is a geographical governmental entity, a non-geographical governmental entity, or a private entity. Most people know that the position of a group, especially a large one, on an issue cannot possibly reflect the unanimous opinion of all members, any more than the position of a city council on an issue reflects the unanimous views of all citizens of a city. See *Lathrop v. Donahue*, 367 U.S. at 859 (Harlan, J. concurring) ("Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual'") (quoting *In Re Integration of Bar* 5 Wis.2d 618, 623 (1958)).

Further, the State Bar of California (or, for that matter, a diversified national union of several hundred thousand people, such as the one involved in *Communications Workers v. Beck*, *supra*) has considerably more members, and is considerably more multifaceted and complex in its goals, activities, and internal operations, than a small town school district (see *Citizens to Protect Public Funds v. Board of Education*, *supra*) or than many other traditional geographically-based governmental units.

There is consequently no basis for drawing a line between traditional governmental entities and other entities supported by exacted fees on the basis that the individual's contribution is converted more directly, or more perceptibility, into the entity's expression in the one instance than in the other. Rather, in all these instances, the individual contributes to a general fund, where his or her contribution is commingled with all other exacted contributions and where the fund is then devoted to those projects, expressive and otherwise, that the entity as a whole has decided to pursue.<sup>13</sup>

<sup>13</sup> Where government is funding speech through traditional taxation, there may be several decision-making junctures before the allocation of funds to speech activity is determined. For example, when the government funds public broadcasting, it is the broad-

Nor is the line of demarcation suggested by Justice Powell in his dissent in *Abood* a viable one for distinguishing between the First Amendment implications of taxation to finance expressive activities and of other government-exacted fees to finance expressive activities.<sup>14</sup> Justice Powell recognized that "a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent" but maintained that

the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. . . and [not] only of one segment of the population, with certain common interests. [431 U.S. at 259 n.13].

caster, not the government, that decides upon the programs to be broadcast and the ideas to be expounded. *FCC v. League of Women Voters of California*, 468 U.S. at 367-69.

We cannot fathom how any difference of constitutional dimension turns upon whether one or two layers of decisionmakers operate upon the commingled funds before those funds are devoted to expressive purposes. Indeed, when a traditional governmental entity is speaking directly, or when exacted fees are collected by a non-geographical governmental entity, or by a private entity, the entity deciding upon speech allocation is the same one that collects the exacted fees initially. The State Bar, for example, divides exacted fees between the activities within its purview in precisely the same way as a local school board treats tax revenues.

Thus, if direct payment to the entity in whose name the speech occurs raised the constitutional stakes, then the most traditional form of governmental speech, that conducted by a *geographically-based governmental entity in its own name*, would be subject to heightened scrutiny.

<sup>14</sup> Given the degree of reliance placed upon Justice Powell's insistence that there is a difference of constitutional dimension between taxes and any other form of governmentally-exacted fees used for expressive purposes (see Pet. App. A-50-51; Petitioner's Opening Brief at 21), it bears emphasis that Justice Powell was in *dissent* in *Abood*, and was offering the proffered distinction to explain why, in his view, the majority opinion was *insufficiently* protective of First Amendment rights. See 431 U.S. at 255-59 (Powell, J., concurring in the judgment).



Neither side of this abstract equation is correct.

First, as we have seen in this country, there is not one government, representative of "the people," but a complex set of thousands of governmental bodies with different geographical and substantive jurisdictions. The national government represents "the people" as a whole, in some sense, but only as to those substantive matters committed to the national government in the Constitution, while the states and their various subdivisions are restricted to representing "only one segment of the population, with certain common interests." As to traditional governmental entities, those common interests arise because individuals who live in a contiguous area are commonly affected by questions concerning the provision of common services for that area.

On the other hand, while it is true that traditional governmental entities are "representative" of the individuals within their sphere of authority in the sense that the governors are elected by those individuals (or at least by such of them as are citizens and of voting age), the State Bar, unions, and other entities charged by statute with representing the interests and views of a group of individuals with functional, rather than geographical, common interests and authorized to compel the payment of fees are also typically set up in accord with democratic ideals. And the group of individuals entitled to a voice in the decisionmaking process is coextensive with the group required to pay the exacted fees. Thus, the individuals who are complaining that their funds are being used for expressive purposes with which those individuals disagree had the opportunity, if they cared to use it, to vote for a member of the State Bar Board of Governors, and through that vote to influence the position taken by the Bar with the use of those funds on issues before the legislature and the courts.<sup>15</sup> Their complaint, then, is

<sup>15</sup> The State Bar of California is unusual, perhaps, in that some of the members of its Board of Governors are nonlawyers, appointed by the Governor rather than elected by the State's lawyers.

identical to that of dissenting taxpayers; viz., that the dissenters failed to prevail in the political process, and now wish to succeed by crippling the financial ability of the Bar to carry out the program approved through the internal, democratic political process.

Finally, the line suggested in the concurring and dissenting opinion below between taxation and other forms of government-mandated financial support—such as that involved in this case—is equally unpersuasive. That opinion suggests that the principles established in *Abood* depend on the precise sense in which fees are compulsory: Where the fee-paying requirement is a condition of pursuing one's chosen means of earning a livelihood, special scrutiny is necessary, while, apparently, a generally deferential standard applies where the financial requirement—taxation—is merely enforced by criminal sanctions. Pet. App. A-46-A-49. Merely to state this proposition is to refute it; plainly, if the issue is comparative coercion, the level of coercion involved in levying and collecting taxes is *greater* than the level of coercion involved in requiring that an individual who has voluntarily chosen to practice law in California pay the requisite mandatory fee for doing so.<sup>16</sup>

Pet. App. A-9. Surely, however, insofar as the Bar is governed by individuals directly responsible to the state government itself, the attempt to distinguish the Bar from traditional state entities funded through taxation becomes all the more ephemeral.

<sup>16</sup> In addition, the case upon which the concurring and dissenting opinion relies for the proposition that the right to practice law is a "fundamental" right (as well as, apparently, for the broader proposition that "the pursuit of one's livelihood" generally is constitutionally fundamental (Pet. App. A-48-49)) clearly does not hold that restrictions on the practice of law are "fundamental" in the sense that those restrictions are subject to particularly stringent judicial scrutiny. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) was a case decided under the Privileges and Immunities Clause, and determined only that in terms of the purpose of that clause—preserving the interchange of commerce among the several states—protecting the right to pursue a profession is "fundamental". Neither *Piper* nor any other case of this

In short, there is no principled basis for subjecting to strict judicial scrutiny legislative determinations that require or permit the exaction of fees from members of groups with common interests and responsibilities, while at the same time permitting the government wide authority to expend tax-generated funds for purposes of direct or subsidized expression of ideas. And as we now show, this Court has *not* in fact sanctioned such a dichotomy.

## II. Applying The *Abood* Standard.

A. Contrary to what one would suppose from a reading of petitioners brief or the opinion below, *Abood* does not hold that each expenditure made by an entity through the use of exacted fees is subject to a separate, traditional First Amendment strict scrutiny analysis, any more than the Court has ever held that "a local school board . . . need[s] to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent," 431 U.S. at 259 n.13.<sup>17</sup>

Court holds that, as a general matter, regulation that impinges upon an individual's ability to pursue an occupation is, without more, subject to strict scrutiny.

<sup>17</sup> Indeed, the disagreement between the majority and the dissent in *Abood* focussed precisely upon the fact that, as the dissent pointed out, the majority did *not* subject either the overall justification for union security agreements nor the specific union expenditures financed by exacted fees to traditional First Amendment strict scrutiny. Compare, 431 U.S. at 222 ("the judgment clearly made in *Hanson* and *Street* is that *such interference as exists* is constitutionally justified by the legislative assessment of the *important* contribution of the union shop"), with *id.* at 255 ("the State should bear the burden of proving that any [exacted] union dues or fees . . . are *needed* to serve *paramount* government interests"). (Emphasis supplied).

There are two later cases in which this Court has applied the general First Amendment analysis of *Abood*. The first, *Ellis v. Railway Clerks*, *supra*, does characterize the First Amendment interests affected by the exacted payment requirement as "significant," 466 U.S. at 455, but then goes on to hold that where justified by a governmental interest, even expenditures that "have direct communicative content and involve the expression of ideas" are

Nor did *Abood* rule that expenditures on expressive activity generally, or, on "ideological" expression such as communicating with the courts or the legislature, particularly, must be independently justified. Indeed, any such rule, would have been difficult to square with the basic holding of the case, that fees for the purpose of collective bargaining may be exacted; there is simply no difference of constitutional dimension between being required to con-

"well within the [constitutionally] acceptable range," *id.* at 456-57. Thus, *Ellis* does *not* hold that the justifying governmental interest must be compelling, and does not subject even expenditures to finance the communication of ideas to a least restrictive alternative analysis; rather the "germaneness" test of *Abood* applies. Whether or not the passing characterization of the First Amendment interest as "significant" is precisely square with *Abood's* language or with the treatment of the same kind of interest in the cases involving government speech financed by taxation, the approach of *Ellis*—allowing fairly free reign to government-aided speech—is consistent with the analysis developed in the text.

Similarly, *Chicago Teachers Union v. Hudson*, *supra*, does cite cases in which infringements on much more substantial freedom of association and expression interests were subject to strict scrutiny, but does not indicate that the interest in not being subject to a government requirement of financial support for expressive activity is *for all purposes* the equivalent of those other interests. In this regard, *Hudson*, 475 U.S. at 302-304, cites both *Roberts v. Jaycees*, 468 U.S. 609 (1984) and *Elrod v. Burns*, 427 U.S. 347 (1976). *Roberts*, of course, did not involve the interest of an individual in not associating with others at all claimed here but the interest of a *group* joined together for expressive purposes to define its own rules regarding the group's composition. Thus, in that case the right of nonassociation was a direct adjunct of—and drew its strength from—an affirmative associational right. And *Elrod* involved the rights of association and expression concerning partisan support of a political candidate. As we explain in the text, those rights *do* involve heightened First Amendment concerns, for reasons of democratic theory that go well beyond the concern with safe-guarding each individual's freedom of belief. Further, both *Roberts* and *Elrod* involved more direct infringements on associational interests than the required payment of funds without more. *Hudson* did not treat expressly with these important differences one way or the other, but did characterize the "infringement on nonunion employees constitutional rights" in the union security context as "*limited*," 475 U.S. at 303 (emphasis added).



tribute over objection to communications with a school board or other public entity at the bargaining table, and being required to contribute over objection to communication on the same subject with other public officials.

Rather, *Abood* imposed only two limitations upon the expenditure of exacted fees, both of which apply generally to government entities expending, or providing for the expenditure of, exacted funds. *First*, such funds may not be spent "to contribute to political candidates." 431 U.S. at 234. And, *second*, such fees may not be used "to express political views unrelated to [the 'cause which justified bringing the group together']". *Id.*<sup>18</sup>

1. The first *Abood* limitation has no direct application here. It is worth noting, nonetheless, in the interest of sustaining our basic proposition that *Abood* states only narrow limiting principles applicable to government-assisted speech generally, that the limitation upon partisan assistance to candidates is one that applies across the board for reasons that go far beyond protecting an individual's freedom of conscience.<sup>19</sup>

The First Amendment interest in autonomy in candidate support involves a different concern than applies with respect to any other form of communication. "The

<sup>18</sup> In *Abood*, of course, the "cause which justified bringing the group together" was "collective bargaining," and that is the phrase that appears in the opinion itself. More generally, however, the opinion recognized that the use of exacted fees is constitutionally justified "as long as [used] to promote the cause which justified bringing the group together." 431 U.S. at 222-23, quoting *Machinists v. Street*, 367 U.S. at 778 (Douglas, J., concurring).

<sup>19</sup> In one respect, the limitation upon the contribution of compelled fees to political candidates is a variation on the germaneness test. A candidate, even one who has taken positions similar to the group's positions on issues that directly affect the group, cannot be bound to forward the interests of those who support him, and will surely be called upon while in office to act upon matters having nothing to do with that group's interests. Thus, campaign contributions entail by necessity a substantial spillover effect into issues as to which the group has no common interest whatever.

constitutional [free speech] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). The reason is that the election process is the base for our entire democratic system:

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process, nor can it be denied that the policymaking power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. [A. Bickel, *The Least Dangerous Branch* (1962) p. 16.]

Thus, the fundamental principle at work is that granting the government any authority to encourage the involuntary aggregation of political campaign support tends to distort, in at least a symbolic way, the basic precept of free majority consent from which the remainder of democratic theory derives. This heightened sensitivity to any official governmental intervention in the balance of partisan political power is the reason, it appears, why "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S. at 870-871; see also *id.*, at p. 907 (Rehnquist, J., dissenting) ("I can cheerfully concede . . . this . . . extreme example[]"). It is also the reason why the otherwise diverse recent commentary on government speech issues is unanimous in the conclusion that direct, unambiguous partisan candidate support is the one area the First Amendment definitely makes off limits for the government. Schiffrin, *Government Speech*, 27 UCLA L. Rev. at 613; M. Yudof, *When Government Speaks*, 170-173; T. Emerson, *The System of Freedom of Expression* (1970) 699 ("[T]he government would not be empowered to engage in direct support of a particular candidate for office. It is not the function of government to get itself reelected.").



Because of these overriding considerations, despite the government's broad authority to engage in expressive activity, "[g]overnment funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government." *Branti v. Finkel*, 445 U.S. 507, 517 n.12 (1980).<sup>20</sup>

2. The second limitation imposed by *Abood* upon expenditures from compelled fees generally is simply a "germaneness" requirement; viz., a requirement that the expenditure be reasonably related to the legislative purpose behind the legislative decision to require individuals with common interests to finance a common endeavor. As Justice Douglas noted:

<sup>20</sup> In a related context this Court has recognized a determinative distinction between the interest in not financing partisan political campaigns and the interest in not financing other kinds of speech on public matters (including issue referenda).

In enacting the ban upon the use of corporate and union treasury funds for federal campaign contributions and expenditures, Congress was concerned in part with eliminating a "threat to the political marketplace" by insuring that "the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source." *Federal Election Commission v. Massachusetts Citizens for Life*, 107 S. Ct. at 628, quoting *Pipefitters v. United States*, 407 U.S. 385, 423-24 (1972) and *United States v. Automobile Workers*, 352 U.S. 567, 582 (1957).

In the context of candidate campaign contributions, this Court has recognized the legitimacy of that concern, and of the related concern in "prevent[ing] an organization from using an individual's money for purposes that the individual may not support." *Federal Election Commission v. Massachusetts Citizens for Life*, 107 S. Ct. at 629; *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208 (1982).

Where, however, the question is the validity of a broader prescription upon corporate speech on public issues generally, this Court viewed the interest in protecting shareholders from undesired association with a public issue communication the individual does not wish to support as insubstantial. *First National Bank v. Bellotti*, 435 U.S. at 794 n.34; see also *id.* at 812-822 (White, J., dissenting).

If . . . dues are used [by a union] to promote or oppose birth control, to repeal or increase the taxes on cosmetics [or] to promote or oppose the admission of Red China into the United Nations. . . then the group compels an individual to support with his money causes beyond what gave rise to the need for group action. [*Machinists v. Street*, 367 U.S. at 777 (concurring opinion)].

As these examples demonstrate, the "germaneness" standard is neither toothless, nor does it interject the courts into fine judgments about whether this or that expenditure with exacted fees, is essential to, or necessary for achieving the legislative purpose.<sup>21</sup> And in most instances it is the standard that the legislature itself has followed.<sup>22</sup>

<sup>21</sup> *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674, 679-81 (D. P.R. 1988), illustrates the kind of expenditures that are beyond the bar's legitimate concern, however broadly that concern is articulated, because those expenditures are simply unrelated to the common legal profession that binds the "latent group" brought together as the state bar. There the Bar Association expended compelled fees upon activities relating to Puerto Rican nationalism, the Somoza regime in Nicaragua, the Russian invasion of Afghanistan, the Olympic Games, Haitian democracy, condemnation of the draft as a "blood tax", and activities of the Puerto Rican Socialist Party. *Id.* at 679-80. These activities relate to neither the common interest of lawyers in a regulated profession, nor the common expertise of lawyers in the drafting and implementation of laws.

As this example illustrates, where the germaneness standard is not met, government-compelled support for expression on issues of public importance does come more closely to resemble recognized instances of infringement of individual freedom of mind, in that the only available government justification then becomes the illegitimate one of compelling support of ideas in which one disbelieves. At the same time, the government justification for exacting fees from a limited group, and not from the population as a whole, becomes unpersuasive, since there is no sense in which the limited group bears some special relationship to the expenditure in question.

<sup>22</sup> This case is a good illustration of this general point: The California Supreme Court determined, on statutory grounds, that certain expressive activities were, as a matter of legislative intent, beyond the authority of the State Bar. Consequently, there was no

The germaneness standard applies as well to the communicative activities of traditional governmental entities. A government, federal, state or local, is formed to promote the common interests of its citizens in all areas of life. Its range of discourse is necessarily equally broad and can be expected to encompass many "political or ideological" issues. Nonetheless, as we have seen (pp. 15-19 *supra*), even geographically-based governmental entities vary widely in their physical and substantive scope. And, where a governmental entity expends funds on matters plainly beyond the collective interests the entity was created to serve, the same heightened First Amendment concern exists, and the same lack of legislative justification comes to the fore.<sup>23</sup>

B. In *Abood*, the governmental interest fostered by Congress was the maintenance of labor-management peace through union collective bargaining. Here the state interests advanced by the Legislature are the regulation of attorneys and the improvement and advancement of jurisprudence and the administration of justice. Those

need to examine as a constitutional matter whether those activities were "germane" to a legitimate legislative purpose relating to some common interest or responsibility of the lawyers in California.

This "ultra vires" approach is likely, where governmental entities are involved, to catch most instances in which the connection between the "cause which justified bringing the group together" and the expressive activities engaged in by the resulting formal organization is tenuous. And, as the case law indicates, where the exacted fees are spent by private organizations, whose overall organization purposes and activities are beyond governmental control, the connection between the group's activities and exacted fees likely to come up as a constitutional issue is often dealt with in terms of a statutory limitation. See pp. 5-6 n.1, *supra*.

<sup>23</sup> Thus, for example, if a government representing a limited geographic entity and a defined substantive jurisdiction, such as a school board, undertook extensive advocacy of ideological positions respecting foreign policy, it would appear that the affected taxpayers have a constitutional complaint as valid as that of the members of the integrated bar in *Schneider v. Colegio de Abogados de Puerto Rico*, *supra*.

functions constitute the State Bar's *raison d'être* and form the framework against which the petitioners' constitutional challenge must be judged.

The petitioners' complaint in this case relates not to the regulatory functions of the Bar, but to its activities regarding the advancement of jurisprudence. It is true, of course, that "advancement of jurisprudence" is a broad concept, and that, as a result of the California Supreme Court's construction of the Bar's authority in this regard, exacted fees may be spent upon commentary on, and participation in, the legislative and judicial creation and interpretation of the law generally. That is an entirely sound result.

Members of the bar share not only a common occupational interest, involving such matters as fees, legal ethics, client relations, and so on but, in addition, a common expertise—and a common professional obligation—concerning certain matters which are, inherently, matters of public interest.<sup>24</sup> Consequently, the state legislature has determined that lawyers as a group have not only a common self-interest, but also a common responsibility to see that their collective expertise is available to the public through a system that provides for the reasoned review

<sup>24</sup> This reasoning may apply in the union context as well. For example the represented employees may be members of a profession, with policy-related expertise, such as teachers, engineers, or nurses; indeed, the unions that represent such employees for collective bargaining purposes often began as professional groups. There is no inherent constitutional limitation that precludes the legislature from seeking to draw upon that common expertise. The legislature is free also to choose instead to confine the area of activity financed with exacted fees to those revolving around the employment relationship. See *Minnesota State Board v. Knight*, 485 U.S. 271 (1988) (state scheme for involving community college instructors in policy-related questions through the union chosen for collective bargaining purposes); *Cumero v. Public Employment Relations Board*, *supra* (teachers' union is entitled under state law to consult on policy matters, but only with the local school board, not with the legislature).

of law-related questions by as many of the state's lawyers, in the aggregate, as can be persuaded to participate.<sup>26</sup>

Were this system funded through general taxation, it would seem plain, on the principles explored in Part I, *supra*, that there could be no First Amendment complaint on the part of either taxpayers in general, or lawyers in particular. Thus, if there is any legitimate First Amendment interest implicated here, it would have to inhere in a total lack of "fit"—of germaneness—between the special characteristics of the subgroup required to provide the funding and the subject matter of the funding so that compelled support of ideas becomes the *only* recognizable governmental purpose behind the exaction. But as long as the expenditures do remain focused upon the cause which justified bringing the group together—in this instance, on the expertise of lawyers on the lawmaking and law interpretation process—the sense in which the funding requirement represents a compelled affirmation of belief is as attenuated and as insubstantial in constitutional terms as in the traditional taxation context.

### CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be affirmed.

---

<sup>25</sup> This judgment is one which underlies not only the California State Bar, but the integrated bar concept generally. *See, e.g., Lathrop v. Donohue, supra*, 367 U.S. at 862 (Harlan, J., concurring), quoting the Wisconsin's Supreme Court's assessment of the purposes justifying the integrated bar:

[T]he public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation.

Respectfully submitted,

MARSHA S. BERZON  
177 Post Street  
San Francisco, CA 94108

LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, DC 20006  
(202) 637-5390



No. 88-1905

Supreme Court, U.S.

FILED

JEC 18 1989

JOSEPH F. SPANIOL, JR.  
CLERK

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,  
*Petitioners,*

VS.

STATE BAR OF CALIFORNIA, *et al.*,  
*Respondents.*

On Writ of Certiorari to the California Supreme Court

### BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR THE ADMINISTRATION OF JUSTICE IN SUPPORT OF RESPONDENTS

JAMES J. BROSDAHAN  
GEORGE C. HARRIS  
MORRISON & FOERSTER  
345 California Street  
San Francisco, CA 94104  
(415) 677-7000

*Attorneys for Amicus Curiae  
Lawyers' Committee For The  
Administration of Justice*

248

## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICUS .....	1
STATEMENT OF THE CASE .....	4
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I. THE PURPOSE OF THE STATE BAR OF CALIFORNIA AS ESTABLISHED BY STATUTE AND THE STATE CONSTITUTION REQUIRES INVOLVEMENT IN THE ADMINISTRATION OF JUSTICE .....	6
A. Participation in Legislation and Law Reform Is Central to the Statutory Purpose of the Integrated Bar .....	6
1. The Origins of the Integrated Bar Movement .....	6
2. The Concept and Practice of the Integrated Bar .....	8
3. The Integrated Bar in California .....	9
B. California's Integrated Bar Provides a Democratic Forum for Deliberation by the Lawyers of the State on Matters Affecting the Administration of Justice .....	10
II. THE CALIFORNIA LEGISLATURE'S CREATION AND MAINTENANCE OF AN INTEGRATED BAR PROMOTES FREEDOM OF SPEECH .....	12
III. ANY BALANCING OF INTERESTS FAVORS THE PREROGATIVE OF THE CALIFORNIA LEGISLATURE TO MAINTAIN AN INTEGRATED BAR .....	17
CONCLUSION .....	19

## TABLE OF AUTHORITIES

## Cases

	<u>Page</u>
Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977) .....	3, 12-13, 15
Herron v. The State Bar of California, 212 Cal. 196, 298 P. 474 (1931) .....	7
Keller v. The State Bar of California, 47 Cal. 3d 1152, 767 P. 2d 1020, 255 Cal. Rptr. 542 (1989) .....	passim
Lathrop v. Donohue, 367 U.S. 820 (1961) .....	9-12, 14-15

## Statutes

Cal. Bus. & Prof. Code:	
§ 6000 .....	7
§ 6030 .....	7
§ 6031 .....	7, 16
§ 6043 .....	7
§ 6046 .....	7
§ 6125-31 .....	7
§ 6140.5 .....	7
§ 6150-54 .....	7
§§ 6200-06 .....	7

## Other Authorities

<i>Bar Integration Is A National Movement</i> , 22 J. Am. Judicature Soc'y 211 (1939) .....	6
G. Brand, <i>Bar Organization and Judicial Administration—A New Horizon</i> , 34 J. Am. Judicature Soc'y 38 (1950) ...	4
W. Glaser, <i>Three Papers on the Integrated Bar</i> (August, 1960) (Available in The University of California, Berkeley Law Library) .....	6
C. Goodwin, <i>The Public Function of the Bar</i> , 5 J. Am. Judicature Soc'y 181 (1921) .....	5
R. Pound, <i>The Crisis In American Law</i> , 10 J. Am. Judicature Soc'y 5 (1926) .....	5

## TABLE OF AUTHORITIES

## OTHER AUTHORITIES

	<u>Page</u>
<i>Progress of Bar Integration Movement</i> , 23 J. Am. Judicature Soc'y 161 (1939) .....	1
<i>Redeeming a Profession</i> , 2 J. Am. Judicature Soc'y 105 (1918) .....	1, 4, 6
C. Thornal, <i>The Unified Bar—Integration or Disintegration</i> , 52 J. Am. Judicature Soc'y 360 (1969) .....	7



No. 88-1905

---

**In the Supreme Court**  
OF THE  
**United States**

---

OCTOBER TERM, 1989

---

EDDIE KELLER, *et al.*,  
*Petitioners,*

VS.

STATE BAR OF CALIFORNIA, *et al.*,  
*Respondents.*

---

**On Writ of Certiorari to the California Supreme Court**

---

**BRIEF AMICUS CURIAE OF THE LAWYERS'  
COMMITTEE FOR THE ADMINISTRATION OF  
JUSTICE IN SUPPORT OF RESPONDENTS**

---

**INTEREST OF AMICUS**

The Lawyers' Committee for Administration of Justice ("the Committee"), comprised of the attorneys at law whose names are set forth below, are all duly admitted to practice in the courts of the State of California and are members of the State Bar of California. They have joined together for the sole purpose of filing with the Court this *amicus curiae* brief. The members of the Committee are familiar with the questions involved in this case and the scope of the presentation made by the parties in the courts below and believe that there is necessity for additional argument on the nature and purpose of the integrated bar, both in general concept and specifically in the case of the State Bar of California, as well as on the free speech issues from the perspective of individual lawyers in California. Respondents and petitioners have both consented to filing of this brief. Their written consents are filed herewith.

The Committee membership is as follows:

P. Terry Anderlini was the president of the State Bar of California from 1987-88 following three years on the Board of Governors. He is a partner in the San Mateo law firm of Anderlini, Guheen, Finkelstein & Emerick and is a member of the Commission on Judicial Performance of the State of California.

David M. Balabanian, a partner at McCutchen, Doyle, Brown & Enersen, has served as chair of the Conference of Delegates of the State Bar of California and as president of the Bar Association of San Francisco.

James J. Brosnahan is a partner at Morrison & Foerster in San Francisco. He is a past president of the Bar Association of San Francisco and has been a delegate to the Conference of Delegates of the State Bar of California for many years.

Edmund G. Brown was governor of California from 1959-66. He is with the Los Angeles firm of Hall, Hunt, Hart, Brown & Baerwitz.

Kevin R. Culhane is an immediate past vice-president of the State Bar of California and served on the board from 1986-89. He is a partner in the Sacramento law firm of Hanson, Boyd, Culhane & Watson and has also taught at the University of the Pacific, McGeorge School of Law since 1976.

Joanne M. Garvey is a partner at Heller, Ehrman, White & McAuliffe in San Francisco. A past president of the Bar Association of San Francisco, she also served on the State Bar Board of Governors from 1971-74 and was vice-president from 1973-74.

Alvin H. Goldstein, Jr. is a partner at Goldstein & Phillips in San Francisco and was the original chair of the State Bar's Section on Litigation. He was a Special Assistant to the Attorney General of the United States and was a judge on the Marin County Municipal Court from 1965-70.

Harry L. Hathaway, Hill, Farrer & Burrill, is president of the Los Angeles County Bar Association and the immediate past president of the American Bar Foundation.

Joan K. Irion, the 1987-88 president of the California Young Lawyers Association and its representative on the State Bar Board of Governors from 1988-89, is a partner at Heller, Ehrman, White & McAuliffe. She now serves on the Judicial Nominees Evaluation Commission of the State Bar and is on the board of directors of the Bar Association of San Francisco.

Kurt W. Melchior is a partner at Nossaman, Guthner, Knox & Elliott in San Francisco. A past member of the State Bar's Board of Governors, he presently serves as the chair of the State Bar delegation to the American Bar Association House of Delegates.

Dale Minami is a partner with Minami, Lew, Tamaki & Lee in San Francisco. He has served on the Judicial Nominees Evaluation Commission of the State Bar of California and received the president's Pro Bono Service Award in 1984.

Margaret M. Morrow is a partner at Quinn, Kully & Morrow in Los Angeles. She is immediate past president of the Los Angeles County Bar Association and has been a delegate to the Conference of Delegates of the State Bar for many years.

Roger Ruffin is a former judge of the Superior Court of California and currently is a partner at Ruffin & Rotwein in San Francisco. He has served on the board of directors of the Bar Association of San Francisco.

Daniel U. Smith is an appellate attorney in Kentfield in Marin County and a member of the California Academy of Appellate Lawyers. He was co-chair of the Appellate Courts Committee of the Bar Association of San Francisco and has served on the board of the San Francisco Trial Lawyers Association.

Sharp Whitmore, retired, was a partner with Gibson, Dunn & Crutcher. He is a former State Bar Board of Governors member and is the 1988 recipient of the Kutak Award from the American Bar Association.

Colin W. Wied was president of the State Bar of California from 1988-89 and chaired the Conference of Delegates of the State Bar in 1984. He is a partner at Kindel & Anderson in San Diego and Orange County.

Robert L. Winslow heads the trial department at the Los Angeles firm of Irell & Manella and is a former judge of the Superior Court of California. He is also a former member of the State Bar Section on Litigation.

Hoyt H. Zia is Senior Division Counsel at Motorola Law Department in Cupertino. He has served as president of the Asian/Pacific Bar of California and was recently elected the first president of the National Asian Pacific American Bar Association.

### STATEMENT OF THE CASE

Petitioners, members of the California State Bar, have challenged the use of their dues to fund certain activities, including: an annual state bar convention, lobbying with regard to proposed legislation and the filing of *amicus curiae* briefs in pending litigation. As finally determined by the California Supreme Court in the decision below, *Keller v. The State Bar of California*, 47 Cal. 3d 1152 (1989), these challenged activities are germane to the statutory purposes of the California State Bar as enacted by the state legislature. This Court is presented with a single issue: Can the California legislature constitutionally establish, as an agency of the state, an integrated bar with the authority to take public positions—arrived at through debate and deliberation in a democratic, public forum—on proposed legislation and pending litigation?

### SUMMARY OF ARGUMENT

Prior to the advent of the integrated bar in this country, there was no public forum for democratic debate and deliberation within the profession on matters affecting the administration of justice. California's integrated bar, created and established by the California legislature as a state agency, provides such a forum and gives the state thereby the benefit of the collective experience and expertise of the lawyers of the state on matters of legislation and law reform.

The intent and effect of the action of the California legislature in creating and maintaining an integrated bar with the freedom

and obligation to comment on issues of legislation and law reform are not to promote any particular point of view but to create a democratic public forum for deliberation and debate among the state's lawyers. Fees paid by the state's lawyers do not support the ideological activities of a private association but rather maintain this neutral, public forum.

The ideological neutrality of the California legislature's establishment of an integrated bar and the democratic forum which it maintains distinguish California's integrated bar from a labor union and distinguish this case from *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) and its progeny. Unlike a labor union, which is a private association with an ideological charter and purpose, the California State Bar is a state agency, created by the state legislature, which takes positions on public issues only as the result of democratic deliberation in an open, public forum. For purposes of First Amendment analysis, the California State Bar is unlike a private association and indistinguishable from other state agencies or commissions or political subdivisions.

The California legislature's creation of an integrated bar promotes rather than infringes the free speech rights of the state's lawyers. It provides a forum for debate and discussion within the profession by which members of the profession can solicit the support of the profession for their point of view without sacrificing any right to dissent or any other avenues of expression.

The holding of the California Supreme Court in the decision below is completely consistent with this Court's holding in *Abood, supra*. Under both decisions mandatory fees cannot be used to support political candidates and can be used only for purposes germane to the organization's statutory purpose. What distinguishes this case from *Abood* is the California legislature's legitimate purpose of engaging the experience and expertise of the state's lawyers on matters of legislation and law reform by providing a forum for debate, deliberation and dissemination of views.



## ARGUMENT

### I. THE PURPOSE OF THE STATE BAR OF CALIFORNIA AS ESTABLISHED BY STATUTE AND THE STATE CONSTITUTION REQUIRES INVOLVEMENT IN THE ADMINISTRATION OF JUSTICE

#### A. Participation in Legislation and Law Reform Is Central to the Statutory Purpose of the Integrated Bar

##### 1. The Origins of the Integrated Bar Movement

When Herbert Harley and the American Judicature Society ("AJS") began the movement for an integrated bar during the early part of this century, the legal profession was represented by voluntary state bar associations that embraced only one-fourth of the entire bar. *Redeeming a Profession*, 2 J. Am. Judicature Soc'y. 105, 106 (1198). These voluntary bar associations, which were largely social institutions, did little or nothing to promote the proper administration of justice. As observed by Dean Wigmore:

[T]he profession was a complacent, self-satisfied, genial fellowship of individual lawyers—unalive to the shortcomings of justice, unthinking of the urgent demands of the impending future, unconscious of their potential opportunities, unaware of their collective duty and destiny.

G. Brand, *Bar Organization and Judicial Administration—A New Horizon*, 34 J. Am. Judicature Soc'y. 38, 40 (1950).

Notwithstanding the complacency and impotence of these voluntary bar associations, they did represent the profession; not because they were well qualified to do so, but because there was no other representation for the profession and no other forum for deliberation within the profession on matters of public importance. The legal profession was, in effect, represented, controlled and governed by a club. 2 J. Am. Judicature Soc'y. 107 (1918).

Those in the forefront of the movement for bar unification recognized that, under this regime of disorganization and representation by club, lawyers were not fulfilling their obligations to society as "officers of the great department of justice [who] are as much a part of the Government and governmental machinery as

are the judges themselves." C. Goodwin, *The Public Function of the Bar*, 5 J. Am. Judicature Soc'y. 181, 181-82 (1921). The inadequacies of that regime demonstrated the need for internal governance of the profession.

[A] great body politic consisting of thousands of judicial officers performing public functions of the greatest importance, exercising the largest influence on the moral well-being of society, and scattered over the entire territory of a state cannot function properly without some adequate machinery for its government. Time has demonstrated that such government cannot be successful when it is exercised spasmodically on the motion of volunteers and through the cumbersome and ineffective instrumentality of court proceedings.

*Id.* at 183. The United States was "the only civilized nation that [did] not have a self-governing bar and [was], as a result . . . the only one in which the office of lawyer [did] not carry with it the respect and esteem of the community." *Id.* at 184.

Those who deplored the disorganized and feeble posture of the bar in the first part of this century also recognized that the responsibilities of the profession were not confined to the competent, ethical representation of private clients but also embraced a wider obligation to the administration of justice and law reform. Roscoe Pound, Dean of Harvard Law School and one of the foremost proponents of the integrated bar, described the inadequacy to this task of the existing bar associations.

They are not continuously at work. They have no means of surveying the whole field. They can give but a fraction of their time. We must find some agency which is always in operation, which works under conditions of permanence, independence, and assured impartiality, in which, therefore, the public may repose confidence.

R. Pound, *The Crisis In American Law*, 10 J. Am. Judicature Soc'y. 5, 9 (1926).

## 2. The Concept and Practice of the Integrated Bar

As conceived by Herbert Harley and the AJS, the solution to the problem of ineffective representation of the profession was to establish an integrated bar, which would represent all kinds of lawyers from all parts of the state. An integrated bar, in which all lawyers are members, is capable of taking on the tasks of enforcing professional standards and disciplinary rules, while mustering bar opinion and influence for the support of the judiciary and legislature with respect to the administration of justice.

The hallmark of the integrated bar is democratic governance. In all integrated state bars, all active members may hold state bar office and vote in elections. W. Glaser, *Three Papers on the Integrated Bar*, 4, (August 1960) (Available in University of California, Berkeley Law Library). Through election of a board of governors and a house of delegates the integrated bar provides a representative forum. Glaser, at 4-11. Each state bar has a president and one or more vice-presidents, who are elected by ballot. Glaser, at 11.

The only requirement exacted from the individual lawyer is the payment of an annual fee, which goes to the establishment and maintenance of a democratic forum by which the voices of all the state's lawyers may be heard. After paying the fee, the lawyer can ignore the bar entirely. Or he can demonstrate his

disaffection positively, by agitation for the repeal of bar rules, or their emasculation. He may organize others of his kind to resist enforcement by all lawful means. He may use his privilege to disparage unification and its agents in any words short of libel, and may extend his efforts to states two thousand miles away.

*Bar Integration Is A National Movement*, 22 J. Am. Judicature Soc'y. 215 (1939). On the other hand, each lawyer may participate within the democratic processes of the bar. "If any lawyer does not like the way the association which stands for his professional interests is managed let him become a member and do his kicking from within, where it may be constructive." 2 J. Am. Judicature Soc'y. 107 (1918).

The basic mission of the integrated bar is to participate in and improve the administration of justice. Bar integration recognizes the status of the lawyer as an essential part of the judicial machine, and further recognizes as "one of the historic roles of all lawyers—the honorable, forthright molding of public opinion." C. Thornal, *The Unified Bar—Integration or Disintegration*, 52 J. Am. Judicature Soc'y. 360, 362 (1969). The integrated bar draws on its collective expertise and wisdom to make a contribution to the legislative and judicial processes. Every state bar studies and proposes legislative and judicial reforms in areas, both procedural and substantive, that affect the administration of justice. *Id.* at 23.

## 3. The Integrated Bar in California

In 1927, the California Legislature adopted the State Bar Act, now codified at California Business & Professions Code § 6000 *et seq.*, which established an integrated bar. The California State Bar continues to function as the fulfillment of the idea of the integrated bar as conceived by the AJS and the founders of the unified bar movement.

The California State Bar is authorized to examine all applicants for bar admission (Cal. Bus. & Prof. Code § 6046), investigate complaints and make recommendations regarding conduct of members (Cal. Bus. & Prof. Code § 6043), enforce the law relating to the unlawful practice of law and illegal solicitation (Cal. Bus. & Prof. Code §§ 6030, 6125-131, 6150-154), administer an arbitration system for free disputes (Cal. Bus. & Prof. Code §§ 6200-6206), maintain a client security fund (Cal. Bus. & Prof. Code § 6140.5) and engage in other matters relating to the governance of the legal profession. *Keller, supra*, 47 Cal. 3d at 1160-61.

The California State Bar is also empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice . . ." (Cal. Bus. & Prof. Code 6031(a)). This "has been called the 'laudable general purpose of the [State Bar] act.'" *Keller, supra*, at 1160, *quoting from Herron v. The State Bar of California*, 212 Cal. 196, 199 (1931). To fulfill this purpose, the State Bar has broad authority, under California law, to engage in lobbying and



*amicus curiae* activities. *Keller* at 1173. As articulated by the California Supreme Court in the opinion below:

The drafting of a proposed law, the understanding of the relationship between the law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment.

*Id.* at 1169.

The California State Bar's Conference of Delegates is comprised of over 500 delegates representing voluntary, city, county, minority, women's and other eligible bars from throughout the state. Each local, voluntary bar chooses a certain number of delegates based on the number of attorneys in a county and the number belonging to each local bar in that county. Delegates debate and vote on resolutions that advocate law reform or other changes in the administration of justice. Based on the successful resolutions, the conference adopts a legislative program for the following year.

**B. California's Integrated Bar Provides a Democratic Forum for Deliberation by the Lawyers of the State on Matters Affecting the Administration of Justice**

As established by the California legislature, California's integrated state bar provides a forum for deliberation among the lawyers of the state on issues affecting the administration of justice. The forum itself is without substantive content or ideology. It is a neutral, democratic framework within which the members of the profession can deliberate towards majority and dissenting views on issues regarding the administration of justice, including law reform and the proper implementation of existing laws. The state bar convention, challenged by petitioners, is a primary mechanism for that deliberative process. Lobbying on proposed legislation and the filing of *amicus curiae* briefs in pending litigation, activities also challenged by petitioners, are the primary means by which the Bar disseminates the results of that deliberative process.

The state's interest in establishing and maintaining this forum is obvious and compelling. Lawyers are officers of the court and, as such, agents of the state for the administration of justice. They are professionally trained and experienced through practice in the theory and reality of the formulation and implementation of the laws of the state. They grapple daily, through the representation of their clients, with the implications and impacts of the state's legislative and judicial pronouncements. It would, indeed, be shocking (as it was to the founders of the integrated bar movement) and wasteful if the state had no systematic means for tapping this resource—the collective experience and expertise of the state's lawyers as arrived at through a democratic, deliberative process—for the public welfare.

The alternative to this democratic forum is that the collective and deliberative views of the state's legal practitioners will be expressed on matters of law reform, if at all, only through the *ad hoc* efforts of private groups of attorneys. While such efforts undoubtedly also make a significant contribution to the processes of legislation and law reform, it has been the experience and judgment of the founders of the integrated bar movement, as well as the legislative judgment of the state of California and other states, that the public interest is better served by providing this forum: a state agency governed by democratic processes and open to all lawyers in the state on equal terms. As articulated by the Wisconsin Supreme Court in *Lathrop v. Donohue*, and quoted with approval by Justice Harlan in his concurring opinion:

"We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association."



*Lathrop v. Donohue*, 367 U.S. 820, 862 (1961) (Harlan, J., concurring), quoting *Lathrop v. Donohue*, 10 Wis.2d 230, 239-40, 102 N.W.2d 404, 409-10.

The maintenance of a democratic, public forum for debate and deliberation among the state's lawyers on matters of legislation and law reform serves an additional public function. It makes lawyers, who are officers of the court and agents of the state and empowered by the state with responsibility for the administration of justice, more accountable to the general public by making their deliberations a matter of public record and scrutiny. This purpose is of special note and significance in California, where six of the 23 members of the State Bar's governing board are non-lawyers appointed by the governor and confirmed by the legislature. Those board members function as "consumer representatives," participating in, monitoring and voting on the official activities of the state's lawyers.

## II. THE CALIFORNIA LEGISLATURE'S CREATION AND MAINTENANCE OF AN INTEGRATED BAR PROMOTES FREEDOM OF SPEECH

This Court held in *Lathrop v. Donohue*, *supra*, that a state may constitutionally establish an integrated bar, with mandatory membership and dues, and does not thereby create "any impingement upon protected rights of association." 367 U.S. at 843. No intervening decision has questioned or eroded that rule of law. The plurality opinion in *Lathrop* left open, however, the further question of whether an attorney's "constitutional rights of free speech are infringed if his dues money is used to support the political activities of the State Bar." 367 U.S. at 844. Justices Harlan, Frankfurter and Whittaker reached that question and found no infringement of free speech. Justices Black and Douglas reached the opposite result and dissented from the opinion of the Court.

The primary contention of petitioners here, as in *Lathrop*, is that their rights of free speech are infringed because the state has compelled them to pay fees as a mandatory condition of practicing their profession, and has then used those fees to finance the dissemination of "political" views which petitioners oppose. The

State of California has not, however, in fact, compelled fees with either that intention or that effect.

The intent and effect of the California legislature's creation and maintenance of an integrated bar with the freedom and obligation to comment on issues of legislation and law reform are not to promote any particular point of view but to create a forum for debate and deliberation through processes of representative democracy among the state's lawyers. The legislators who gave life to the integrated bar, and those who have maintained it as the law of the state, did not and could not have predicted the substantive outcomes of that forum. They did not and could not have predicted that the integrated bar would support or oppose their own ideologies or political philosophies or their own views on any particular issue of legislation or law reform. Those legislators did not undertake to tax lawyers in order to support any particular point of view, but rather sought to provide a forum for debate and deliberation with full democratic accommodation for both consensus and dissent. As expressed by Justice Harlan, in *Lathrop*, *supra*, with regard to Wisconsin's establishment of an integrated bar:

In establishing the Integrated Bar Wisconsin has, I assume all would agree, shown no interest at all in favoring particular candidates for judicial or legal office or particular types of legislation. Even if Wisconsin had such an interest, the Integrated Bar does not provide a fixed, predictable conduit for governmental encouragement of particular views, for the Bar makes its own decisions on legislative recommendations and appears to take no action at all with regard to candidates. By the same token the weight lent to one side of a controversial issue by the prestige of government is wholly lacking here.

In short, it seems to me fanciful in the extreme to find in the limited functions of the Wisconsin State Bar those risks of governmental self-perpetuation that might justify the recognition of a Constitutional protection against the "establishment" of political beliefs. A contrary conclusion would, it seems to me, as well embrace within its rationale the operations of the Judicial Conference of the United States,

and the legislative recommendations of independent agencies such as the Interstate Commerce Commission and the Bureau of the Budget.

367 U.S. at 853.

The ideological neutrality of the California legislature's creation of its integrated bar and the democratic forum fostered thereby distinguish the California State Bar from a labor union and distinguish this case from *Abood v. Detroit Bd of Education*, 431 U.S. 209 (1977), and its progeny. A labor union is not an ideologically neutral forum for open, democratic debate. Unlike the California State Bar, which is a state agency maintained under legislative guidelines as a neutral forum, a labor union is a private association with a private ideological character, which is typically expressed in its constitution and charter. By its very existence it takes a stance in favor of collective labor relations and attendant political values. Unlike a state agency, and unlike the California State Bar, a labor union may and typically does support political parties and candidates for office.

Compelled support for a labor union is compelled support for a political association. When a labor union takes a position on pending litigation or on proposed legislation, that position cannot be separated from its ideological charter and political purpose for being. The political positions of the integrated bar are, on the other hand, like those of the agencies and commissions to which Justice Harlan compared the bar, the result of the deliberative processes of a public forum.

It is in this sense that the distinction relied on by the California Supreme Court in the decision below—that between a state agency and a labor union—is meaningful and decisive. The position taken by each organization on a particular piece of proposed legislation or pending litigation may be identical, and in each case that position has ideological and political content. What is distinctive and determinative is that in the union case the position is that of a private, political organization, but in the case of the state bar it is the outcome of public agency deliberations. Whereas, in the union case, the anti-union worker has been compelled to support the political activity of a private association

whose ideological posture he does not share, the lawyer who dissents from the position taken by the state bar on a particular piece of legislation or litigation has been compelled to support only a neutral forum which arrived at that position through deliberative consensus.

Justice Powell, in his concurring opinion in *Abood, supra*, drew a similar distinction:

Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

431 U.S. at 259 n.13.

For purposes of First Amendment analysis, the California State Bar is, in all significant ways, an agency of government analogous to a local school board and is not a private association. Like a local school board, the State Bar's board of governors is a democratically selected, representative body with public, statutory purposes. Like a local school board, and unlike a union or other private association, it has no ideological charter or constitution and no private economic purpose; it takes ideological or political positions only as the result of deliberative, democratic processes in a public forum.

Indeed, the only significant differences between a local school board and the board of governors of the State Bar are that: (1) the school district and its board are supported by assessments to all persons who live within a certain geographical area and own property, whereas the State Bar and its board of governors are supported by assessments to all licensed lawyers; and (2) all persons within a local geographical area are eligible to elect the



school board, whereas all lawyers in good standing throughout the state are eligible to elect the board of governors (except for those "consumer representative" board members, who are appointed by the governor and confirmed by the state senate). For First Amendment purposes, these are distinctions without a difference. Both are "representative of only one segment of the population"—the school board is representative only of persons living in a particular geographical area and the board of governors is representative of a geographically diverse but probably much larger segment of the population who are all officers of the state's courts. There is absolutely no reason why positions taken by the board of governors on public issues abridge the freedom of speech of their constituents any more than do the positions of the local school board on behalf of their constituents, many of whom may disagree strenuously with those positions. What is significant in the case of both is that they are agencies of government and, unlike unions and other private associations, they have no inherent ideological character or private purpose.

Just as legislation establishing a local school district and a school board (funded by assessments on those who own property in the district) with authority to speak on behalf of the district does not abridge the free speech of property owners in the district, the creation by the California legislature of an integrated bar with a board of governors with authority to speak on behalf of the agency does not abridge in any degree the free speech of lawyers in the state. Indeed, the creation of the state bar, by providing a forum for discussion and debate within the profession, enhances rather than diminishes the free speech rights of the state's lawyers. It provides an additional forum for expression of their views without taking from them their right to dissent or any other avenues of expression. As reasoned persuasively by Justice Harlan in his concurrence in *Lathrop*:

It seems to me these arguments [that mandatory contribution to an integrated bar diminishes the speech rights of members of the bar] have little force. In the first place, their supposition is that the voice of a dissenter is less effective if he speaks it first in an attempt to influence the action of a democratically organized group and then, if necessary, in

dissent to the recommendations of that group. This is not at all convincing. The dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure about which he will have something to say. To the extent that his voice of dissent can convince his lawyer associates, it will later be heard by the State Legislature with a magnified voice.

367 U.S. at 856.

### III. ANY BALANCING OF INTERESTS FAVORS THE PREROGATIVE OF THE CALIFORNIA LEGISLATURE TO MAINTAIN AN INTEGRATED BAR

As demonstrated in Part II above, the California legislature's use of mandatory fees from lawyers to create a democratic, neutral forum for discussion and debate among all lawyers in the state, and its provision for dissemination of those views through lobbying and *amicus curiae* briefs, do not diminish or infringe the rights of petitioners protected by the First and Fourteenth Amendments. There is, therefore, no need to balance petitioners' rights against the state's legitimate interest in creating and maintaining an integrated bar. Even assuming, however, for the sake of argument, that the functions of the integrated bar burden to some degree petitioner's free speech rights, that burden is justified by the state's interest in having a forum for discussion and debate among the lawyers of the state on matters of legislation and law reform.

Nothing in the prior decisions of this Court is to the contrary. Indeed, the holding of the California Supreme Court below is completely consistent with the holding of this Court in *Abood v. Detroit Bd. of Education*, *supra*.

*Abood* did not hold that mandatory dues could not be used for "political" purposes. To the contrary, the Court stated in *Abood* that:

Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "politi-



cal" can properly be attached to those beliefs the critical constitutional inquiry.

431 U.S. at 232. Under the holding in *Abood*, what distinguishes between permissible and impermissible expenditures of agency fees paid to a union is not the content of speech resulting from those expenditures but the relation of that speech to the statutory purpose. The only *per se* impermissible expenditure is in support of political candidates. Beyond that, the line that must be drawn is "between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236.

Similarly, in this case, the California Supreme Court held that mandatory bar fees could not be used for election campaigning and could be used only for matters related to the State Bar's statutory mission to aid "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." Cal. Bus. & Prof. Code § 6031. As concluded by the California court, and as demonstrated above, that statutory purpose, unlike that of collective bargaining representatives, clearly contemplates and includes the dissemination of views on proposed legislation and pending litigation through lobbying and amicus briefs. As further demonstrated above, that statutory purpose serves the state's compelling interest in engaging the experience and expertise of the state's lawyers on matters of legislation and law reform by providing a forum for debate, deliberation and dissemination of views.

## CONCLUSION

For the foregoing reasons, the Lawyers' Committee for the Administration of Justice urges this Court to affirm the decision of the California Supreme Court.

Respectfully submitted,

JAMES J. BROSNAN  
GEORGE C. HARRIS  
MORRISON & FOERSTER  
345 California Street  
San Francisco, CA 94104  
(415) 677-7000

By /s/ JAMES J. BROSNAN  
*Attorneys for Amicus Curiae  
Lawyers' Committee for the  
Administration of Justice*

19  
No. 88-1905

Supreme Court, U.S.

FILED

DEC 18 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The

**Supreme Court of the United States**

October Term, 1989

---

EDDIE KELLER, et al.,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, et al.,

*Respondents.*

---

On Petition For Writ Of Certiorari  
To The California Supreme Court

---

**BRIEF OF CALIFORNIA LEGISLATURE AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

---

BION M. GREGORY  
Legislative Counsel  
3021 State Capitol  
Sacramento, CA 95814  
(916) 445-3057

*Attorneys for Amicus Curiae  
and Counsel of Record*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I. DEFERENCE SHOULD BE GIVEN TO THE DETERMINATION BY THE CALIFORNIA LEGISLATURE AND SUPREME COURT THAT THE STATE BAR OF CALIFORNIA SHOULD BE CONSIDERED A GOVERNMENTAL AGENCY AND THAT LOBBYING, AMICUS CURIAE BRIEFS, AND THE CONFERENCE OF DELEGATES ARE WITHIN THE SCOPE OF THE STATE BAR'S STATUTORY AUTHOR- ITY .....	3
II. THE ROLE OF THE STATE BAR IN IMPROV- ING THE ADMINISTRATION OF JUSTICE AND ADVANCING THE SCIENCE OF JURIS- PRUDENCE SERVES AN IMPORTANT GOV- ERNMENTAL INTEREST .....	13
A. The State Bar Serves the Public Interest in Improving the Administration of Justice and Advancing the Science of Jurispru- dence .....	13
B. Issues Pertaining to the Administration of Justice and the Science of Jurisprudence are Inherently Political and Ideological...	19
CONCLUSION .....	21



## TABLE OF AUTHORITIES

## Page

## CASES

<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977) .....	7
<i>Clairborne County v. Brooks</i> , 111 U.S. 400 (1884) .....	12
<i>Fallbrook Irrigation District v. Bradley</i> , 164 U.S. 112 (1896) .....	12
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985) .....	12
<i>Garner v. Louisiana</i> , 368 U.S. 157 (1961) .....	12
<i>Local 926, International Union of Operating Engineers v. Jones</i> , 460 U.S. 669 (1983) .....	9
<i>People v. Coleman</i> , 4 Cal. 46 (1854) .....	11
<i>Quong Ham Wah Co. v. Industrial Acci. Com.</i> , 255 U.S. 445 (1921) .....	12
<i>Roth Drug, Inc. v. Johnson</i> , 13 Cal. App. 2d 720 (1936) .....	11
<i>Smiley v. Kansas</i> , 196 U.S. 447 (1905) .....	12

## CONSTITUTION

Cal. Const. art. VI, Sec. 6 .....	4, 7
Cal. Const. art. VI, Sec. 8 .....	4, 7
Cal. Const. art. VI, Sec. 9 .....	4

## CALIFORNIA STATUTES

Bus. & Prof. Code Sec. 6000, <i>et seq.</i> .....	4
Bus. & Prof. Code Sec. 6008 .....	6

## TABLE OF AUTHORITIES - Continued

## Page

Bus. & Prof. Code Sec. 6010 .....	4
Bus. & Prof. Code Sec. 6011 .....	4
Bus. & Prof. Code Sec. 6012-6019 .....	4
Bus. & Prof. Code Sec. 6013.5 .....	4
Bus. & Prof. Code Sec. 6026.5 .....	5
Bus. & Prof. Code Sec. 6030 .....	6
Bus. & Prof. Code Sec. 6031 .....	6, 19
Bus. & Prof. Code Sec. 6032 .....	5
Bus. & Prof. Code Sec. 6033 .....	17
Bus. & Prof. Code Sec. 6046 .....	6
Bus. & Prof. Code Sec. 6046.5 .....	5
Bus. & Prof. Code Sec. 6047 .....	6
Bus. & Prof. Code Sec. 6060, <i>et seq.</i> .....	6
Bus. & Prof. Code Sec. 6075, <i>et seq.</i> .....	6
Bus. & Prof. Code Sec. 6079.1 .....	5
Bus. & Prof. Code Sec. 6079.5 .....	5
Bus. & Prof. Code Sec. 6086.65 .....	5
Bus. & Prof. Code Sec. 6086.9 .....	5
Bus. & Prof. Code Sec. 6086.11 .....	5
Bus. & Prof. Code Sec. 6140 .....	5
Bus. & Prof. Code Sec. 6140.1 .....	6
Bus. & Prof. Code Sec. 6140.35 .....	6

## TABLE OF AUTHORITIES - Continued

	Page
Bus. & Prof. Code Sec. 6140.9.....	5
Bus. & Prof. Code Secs. 6210-6228 .....	16
Code of Civ. Proc. Sec. 1141.10, <i>et seq.</i> .....	14
Code of Civ. Proc. Sec. 1141.11 .....	14
Code of Civ. Proc. Sec. 2016, <i>et seq.</i> .....	14
Fin. Code Sec. 32000, <i>et seq.</i> .....	12
Gov't Code Sec. 6261 .....	6
Gov't Code Sec. 8246 .....	8
Gov't Code Sec. 8281 .....	8
Gov't Code Sec. 8287 .....	8
Gov't Code Sec. 8293 .....	8
Gov't Code Sec. 12011.5 .....	8
Gov't Code Sec. 50023 .....	8
Gov't Code Sec. 53060.5 .....	8
Gov't Code Sec. 68600, <i>et seq.</i> .....	14
Gov't Code Sec. 68725 .....	7
Gov't Code Sec. 68903 .....	7
Ins. Code Sec. 12970, <i>et seq.</i> .....	11
Pro. Code Sec. 6200, <i>et seq.</i> .....	16
1989 Cal. Stat. 582.....	18
1989 Cal. Stat. 1040.....	12
1989 Cal. Stat. 1223.....	5
1989 Cal. Stat. 1425.....	17

## TABLE OF AUTHORITIES - Continued

	Page
RULES	
Cal. Rules of Court, rule 901, <i>et seq.</i> .....	7
Cal. Rules of Court, rule 1600, <i>et seq.</i> .....	14
Sup. Ct. R. 36 .....	1
MISCELLANEOUS	
<i>Annual Report</i> , 5 Cal. Law. 70 (1985) .....	14
<i>Annual Report of the Board of Governors</i> , 49 Cal. St. B.J. 607 (1974).....	14
<i>Annual Report of the Board of Governors</i> , 50 Cal. St. B.J. 422 (1975).....	14, 15
A.B. 1482, 1983-84 Reg. Sess.....	10
Belcher, <i>President's Message</i> , 17 Cal. St. B.J. 357 (1942) .....	13
Belcher, <i>The Bar and the War</i> , 18 Cal. St. B.J. 304 (1943) .....	13
Casey, <i>Annual Report of the Board of Governors</i> , 51 Cal. St. B.J. 550 (1976).....	13
<i>Committee on Administrative Agencies and Tribunals - 1941-42</i> , 18 Cal. St. B.J. 422 (1943) .....	15
<i>Committee Reports, Administration of Justice</i> , 42 Cal. St. B.J. 708 (1967).....	15
<i>Editorials, Administrative Agencies</i> , 19 Cal. St. B.J. 1 (1944) .....	15
Finger, <i>Report of the Board of Governors</i> , 43 Cal. St. B.J. 635 (1968).....	13

## TABLE OF AUTHORITIES - Continued

	Page
Gibson, <i>For Modern Courts</i> , 32 Cal. St. B.J. 727 (1957) .....	14
Gray, <i>Report of the Board of Governors</i> , 39 Cal. St. B.J. 40 (1951) .....	15
Kleps, <i>The California Administrative Procedures Act</i> , 22 Cal. St. B.J. 391 (1947) .....	15
Mack, <i>President's Message</i> , 40 Cal. St. B.J. 119 (1965) .....	15
Mack, <i>Annual Report of the Board of Governors</i> , 40 Cal. St. B.J. 659 (1965) .....	15
McAuliffe, <i>Message of the President</i> , 23 Cal. St. B.J. 1 (1948) .....	13
Proceedings, 10th Annual Meeting (1937), p. 138 ....	15
Proceedings, 11th Annual Meeting (1938), pp. 83, 200, 235, 372 .....	15
Proceedings, 12th Annual Meeting (1939), pp. 36, 69, 173, 180, 193, 278, 283 .....	15
Regan, <i>The State Bar's Role in the Legislature</i> , 36 Cal. St. B.J. 951 (1961) .....	16
<i>Report of Committee on Administrative Agencies and Tribunals</i> , 19 Cal. St. B.J. 284 (1944) .....	15
S.C.A. 42, 1983-84 Reg. Sess. ....	10
Webster's Third New International Dictionary (1981 unabridged) .....	20
14 Cal. St. B.J. 372 (1939) .....	13

## KELLER v. STATE BAR OF CALIFORNIA

BRIEF OF CALIFORNIA LEGISLATURE  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS

The California Legislature submits this brief, amicus curiae, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of respondents in No. 88-1905, having obtained the written consent of both petitioners and respondents to file this brief. The written consent has been filed with the Clerk.

## INTEREST OF AMICUS CURIAE

The California Legislature does not believe that the facts or questions of law will not be adequately represented by the parties. However, the California Legislature thinks that it can give a different perspective to the Court to aid in its examination of the issues presented in this matter. The amicus curiae brief of the California Legislature will emphasize matters relating to the interest of amicus curiae with respect to its view of the State Bar as a governmental agency and with respect to the role the State Bar serves in the legislative process.

## SUMMARY OF ARGUMENT

The California Legislature and the California Supreme Court have determined that the State Bar is a governmental agency and that lobbying, filing of amicus curiae briefs, and holding an annual conference of delegates are within the scope of the State Bar's authority.



The structure, purposes, and powers of state governmental agencies are matters within the sovereign power of state government and federal courts should defer to the decision of state courts on these matters. Therefore, this Court should not disturb the determination of the California Supreme Court regarding the structure and powers of the State Bar.

Furthermore, the State Bar, as a governmental agency, serves an important governmental interest in improving the administration of justice and advancing the science of jurisprudence. It plays an important role in the legislative process through its linkage with the Judicial Council, and by the fact that it is a major source of valuable information to the Legislature on legislative proposals, providing its legal expertise in both procedural and substantive areas relating to the science of jurisprudence and the administration of justice. Additionally, petitioner and supporting amici urge the Court to limit the State Bar's participation in "political" and "ideological" issues based on standards applied to labor unions. However, these labels are inappropriate in the context of the State Bar's activities. The issues pertaining to the administration of justice and the science or jurisprudence are inherently political and ideological and, therefore, the application of those labels would have a far-reaching sweep and would, in effect, permit those who disagree with the positions of governmental agencies to exercise a veto over governmental speech.

---

## ARGUMENT

### I. DEFERENCE SHOULD BE GIVEN TO THE DETERMINATION BY THE CALIFORNIA LEGISLATURE AND SUPREME COURT THAT THE STATE BAR OF CALIFORNIA SHOULD BE CONSIDERED A GOVERNMENTAL AGENCY AND THAT LOBBYING, AMICUS CURIAE BRIEFS, AND THE CONFERENCE OF DELEGATES ARE WITHIN THE SCOPE OF THE STATE BAR'S STATUTORY AUTHORITY

The Supreme Court of California below determined that the California Constitution, statutes, and judicial decisions "envision the [State Bar of California] as a governmental agency," (Joint Appendix (J.A.) Volume III at 566) and that lobbying, amicus curiae briefs, and the conference of delegates are within the scope of the State Bar's statutory authority (J.A. Vol. III at 578, 585-586). The California Supreme Court has correctly characterized the State Bar as a governmental agency and correctly interpreted its statutory authority. Whatever the status and powers of integrated bar associations in other states, the State Bar of California is a governmental agency under California law and, under California law, it has the power to lobby, file amicus curiae briefs, and hold an annual conference of delegates in order to advance the science of jurisprudence and improve the administration of justice. This is the intention of the State Constitution and the State Legislature as confirmed by the State Supreme Court.

Unlike a labor union or other private association, the State Bar of California was created by statute and its structure and powers are delineated by the State Constitution and statutes. The California Constitution specifies

that the State Bar is a public corporation.<sup>1</sup> Cal. Const. art. VI, Sec. 9. The California Constitution also authorizes the State Bar to appoint members to two other governmental agencies that are within the Judicial Branch: the Judicial Council and the Commission on Judicial Performance. Cal. Const. art. VI, Secs. 6 and 8.

The California Business and Professions Code further delineates the structure and powers of the State Bar. Cal. Bus. & Prof. Code Sec. 6000, *et seq.*<sup>2</sup> Under these provisions, the State Bar is governed by a 22 member Board of Governors. Secs. 6010 and 6011. Six members of this board are public members, four appointed by the Governor and one each appointed by the Senate Committee on Rules and the Speaker of the Assembly. Sec. 6013.5.<sup>3</sup> All but one of the remaining members of the Board are elected by the members of the State Bar from geographic districts, but the procedures for these elections and the districts themselves are delineated by statute. Secs.

<sup>1</sup> As the California Supreme Court noted, it is significant that all other public corporations in the State – water districts, school districts, reclamation districts, etc. – are clearly considered governmental entities. Conversely, no labor union or professional association is classified as a public corporation. J.A. Vol. III at 568.

<sup>2</sup> Unless otherwise indicated, all further California statutory citations are to the Business and Professions Code.

<sup>3</sup> As noted by the California Supreme Court, public “consumer representatives” are common on state regulatory boards, but no law permits the Governor or the Legislature to appoint nonmembers as officers of a labor union or private association. J.A. Vol. III at 569.

(Continued on following page)

6012-6019.<sup>4</sup> All meetings of the State Bar Board of Governors are required to be open to the public, except for matters statutorily excepted. Sec. 6026.5.<sup>5</sup>

State Bar revenues are derived principally from an annual membership fee which is set by the Legislature. Sec. 6140. In addition to these general membership fees, the Legislature has required the State Bar to collect additional fees from attorneys to support a discipline monitor and an independent expert to study the State Bar’s affirmative action program, both of whom report directly to the Legislature. Secs. 6032, 6086.9, and 6140.9.

In its regulation and oversight, the Legislature considers the State Bar as a unitary governmental agency. The State Bar, like other governmental agencies, is required to submit its proposed budget to the Legislature

(Continued from previous page)

The Governor and Legislature also appoint members of certain committees of the State Bar. Secs. 6046.5 and 6086.11. In addition, the Supreme Court and the Legislature appoint or approve the appointment of certain State Bar staff. Secs. 6079.1, 6079.5, and 6086.65. Public officials do not appoint committee members or staff of unions or other private associations.

<sup>4</sup> The provisions setting forth the State Bar districts have recently been amended; beginning in July 1990 the State Bar will be required to adjust the counties included in the districts every 10 years, pursuant to statutory guidelines. 1989 Cal. Stat. 1223.

<sup>5</sup> Again, as noted by the California Supreme Court, similar requirements apply to governmental regulatory boards in California, but not to unions or private associations. J.A. Vol. III at 569.

for approval, including "estimated revenues, expenditures, and staffing levels for *all of the programs and funds administered by the State Bar.*" Sec. 6140.1, emphasis added. And, as an agency provided for in Article VI of the California Constitution, the State Bar is required to have an itemized statement of total expenditures and disbursements open for inspection. Cal. Gov't Code Sec. 6261. The State Bar is also required annually to present "written and oral progress reports on *all the State Bar programs* to the Judiciary Committees of the Senate and Assembly." Sec. 6140.35, emphasis added. Finally, unlike any union or professional association, *all* property of the State Bar is "held for essential public and governmental purposes" and is exempt from taxation. Sec. 6008, emphasis added.

The State Bar, through its Board, is charged with the enforcement of the Business and Professions Code provisions pertaining to attorneys. Sec. 6030. These duties include investigating complaints concerning the conduct of attorneys and, after a hearing conducted by a statutorily authorized State Bar Court, recommending to the Supreme Court that attorneys be disciplined. Sec. 6075, *et seq.* The State Bar is also responsible for examining all applicants for admission to practice law and certifying to the Supreme Court those applicants who fulfill the requirements. Secs. 6046, 6047, and 6060, *et seq.*

In addition, by statute, the State Bar is given the power to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." Sec. 6031(a). This provision and others anticipate that the State Bar's

assistance in these matters is to be provided to the Judicial, Executive, and Legislative Branches of the Government.<sup>6</sup>

With regard to the Judicial Branch, the State Constitution, as noted above, requires the State Bar to appoint members to the Judicial Council and the Commission on Judicial Performance.<sup>7</sup> Cal. Const. art. VI, Secs. 6 and 8. The State Bar is also required by statute to participate with other governmental agencies in contracting for the publication of the official reports of California judicial decisions (Cal. Gov't Code Sec. 68903) and to cooperate and give assistance to the Commission on Judicial Performance (Cal. Gov't Code Sec. 68725). In addition, the State Bar provides assistance to the Judicial Branch by filing amicus curiae briefs in litigation affecting the bar or its members. J.A. Vol. III at 565 and 573.

---

<sup>6</sup> In contrast, labor unions serve a much more limited function of promoting the self-interest of their members in labor-management interactions. The only governmental purpose for requiring membership in and contributions to labor unions is to promote labor peace by avoiding the "free-rider" problem. *Aboud v. Detroit Board of Education*, 431 U.S. 209, 222 (1977).

<sup>7</sup> The Judicial Council has the constitutional duty to "improve the administration of justice" by making recommendations to the courts, the Governor, and the Legislature and by adopting rules for court administration, practice and procedure. Cal. Const. art. VI, Sec. 6. The Commission on Judicial Performance is responsible for investigating complaints concerning the conduct of judges and recommending to the Supreme Court that judges be disciplined. Cal. Rules of Court, rule 901, *et seq.*



By statute, the State Bar is required to assist the Executive Branch by evaluating the judicial qualifications of gubernatorial nominees for judicial appointment. Cal. Gov't Code Sec. 12011.5. In addition, the State Bar is to aid the Legislative and Executive branches through assistance to the California Law Revision Commission. Cal. Gov't Code Sec. 8287.<sup>8</sup>

The State Bar also provides assistance to the Legislature by proposing legislation and evaluating legislative proposals of others relating to the administration of justice and science of jurisprudence. This is the function performed by the State Bar's lobbying activities. The authority of the State Bar to participate in the legislative process is no different than that of other governmental agencies in California. By statute, the California Legislature has determined that governmental agencies like the State Bar may support or oppose legislation deemed beneficial or detrimental to the agency. *See, e.g.,* Cal. Gov't Code Secs. 8246, 50023, and 53060.5.

Petitioners and supporting amici urge this Court to review the determination of the California Supreme Court that the laws of California "envision the [State Bar of California] as a governmental agency" (J.A. Vol. III at 566) and that lobbying, amicus curiae briefs, and the conference of delegates are within the scope of the State Bar's statutory authority (J.A. Vol. III at 578, 585-586). In

<sup>8</sup> The majority of the members of the California Law Revision Commission are appointed by the Governor (Cal. Gov't Code Sec. 8281), but the topics of the Commission's studies must be approved by the Legislature (Cal. Gov't Code Sec. 8293).

addition, they propose various criteria for such review.<sup>9</sup> Although federal courts may be justified in specifying the proper purposes of labor unions based on the pervasive system of federal regulation that has preempted state labor law, *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675-677, 680-681 (1983), the structure, purposes, and powers of state governmental agencies are matters that are peculiarly within the sovereign power of state government, and the federal courts should defer to the decisions of state courts with regard to these matters. As this Court stated over 100 years ago:

<sup>9</sup> Petitioners and supporting amici suggest a number of criteria for the review they propose. First, they would distinguish between mandatory and discretionary functions: only functions clearly mandated would be considered the acts of a governmental agency; discretionary functions would be suspect. Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, pp. 4, 11; Brief Amicus Curiae for the Ad Hoc Committee Opposing Lobbying and Certain Other Activities of a Mandatory Bar in Support of Petitioners, p. 5. Second, they would distinguish based on the source of agency funds: agencies funded by general taxation would be considered governmental agencies; those funded from other sources would be suspect. Petitioners' Opening Brief (Pet. Op. Br.), pp. 10, 22; Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, pp. 11-12; Brief Amici Curiae of the Washington Legal Foundation and the Attorney General of New Mexico in Support of Petitioners, pp. 4, 15; Brief Amicus Curiae of Gibson in Support of Petitioners, pp. 2, 6-8; Brief Amicus Curiae of Joseph W. Little, pp. 18-19. Third, they would distinguish between legislatively established agencies that do and do not govern a portion of the state; those entities governing a geographic portion of the state would be considered government agencies; those that do not

(Continued on following page)

"It is undoubtedly a question of local policy with each state what shall be the extent and

---

(Continued from previous page)

would be suspect. Pet. Op. Br., pp. 22, 23; Brief Amici Curiae of the Washington Legal Foundation and the Attorney General of New Mexico in Support of Petitioners, pp. 4, 15; Brief Amicus Curiae of the National Right to Work Legal Defense Foundation in Support of Petitioners, pp. 6-9; Brief Amicus Curiae of Trayton L. Lathrop in Support of Petitioners, pp. 3-5. None of these criteria are useful for distinguishing between governmental agencies and private organizations.

The mandatory-discretionary dichotomy would place an impossible burden on state legislatures. Legislatures are not in a position to mandate every function within a government agency's scope of authority. For government to function effectively, government agencies must exercise discretion both in the focus of their activities and in selecting the means to carry them out. For example, by statute, many governmental agencies in California have general authority to participate in the legislative process. See p. 8, *supra*. This participation is discretionary with the agency because it is unrealistic to expect the Legislature to anticipate in advance all cases in which agency input would be helpful. Moreover, the legislative process is furthered by permitting governmental agencies wide latitude in providing input to the Legislature rather than setting out rigid guidelines in advance that will become the focus of extraneous disputes interfering with the flow of information into the legislative process. Finally, in connection with the State Bar, the Legislature has specifically rejected attempts to impose limitations of the sort proposed by petitioners on the activities of the State Bar (see, e.g., S.C.A. 42 and A.B. 1482, 1983-84 Reg. Sess. both of which measures failed passage).

The source of funds criterion is similarly unworkable. Governmental agencies today frequently obtain revenues from sources other than general tax revenues. User charges are a

(Continued on following page)

character of the powers which its various political and municipal organizations shall possess;

---

(Continued from previous page)

common revenue source for parks, recreation, sanitation, transportation, and electric power agencies, among others. Government regulatory agencies typically receive fees from those whom they regulate. Determining whether an entity is a government agency by its revenue sources would require courts to trace funds to their revenue source, leading the courts into a factual and legal quagmire. In this connection, while the present charge imposed on attorneys may be properly characterized as a regulatory fee, there would be no constitutional impediment in imposing an identical charge upon attorneys as a group as an excise tax for general revenue purposes. *People v. Coleman*, 4 Cal. 46, 49 (1854) overruled on other grounds 34 Cal. 432, 458 (1868); *Roth Drug, Inc. v. Johnson*, 13 Cal. App. 720, 739-740 (1936). Hence, the fee or tax dichotomy in this instance would appear to have absolutely no significance. Moreover, as a criterion for determining the scope of governmental speech, it could be used to silence those agencies whose information and expertise is most needed in the debate on public issues. Insurance regulation provides one example among many. Governmental agencies that regulate the insurance industry may obtain substantial revenue from fees paid by regulated insurers. See, e.g., Cal. Ins. Code Sec. 12970, *et seq.* This fact should not be a basis for depriving the public and the Legislature of the expertise and informed judgment of these governmental regulators on matters such as insurance industry reform and general tort reform.

Finally, whether an agency governs a geographic portion of the state is not a useful criterion for deciding what is a governmental agency. This test would call into question the numerous governmental agencies in California created over the years that do not govern a portion of the state but regulate selected activities or persons. See J.A. Vol. III at 567-68. See also, the State Assistance Fund for Energy, California Business and Industrial Development Corporation, commonly known as

(Continued on following page)

and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state." *Clairborne County v. Brooks*, 111 U.S. 400, 410 (1884).

See also *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 154, 155, 174 (1896).<sup>10</sup>

The Supreme Court of California has determined that the laws of California "envision the [State Bar of California] as a governmental agency" (J.A. Vol. III at 566) and that the activities challenged by petitioners are within the State Bar's statutory authority (J.A. Vol. III at 578, 585-586). Under established precedent, deference is given to State determinations concerning these matters of state law. *Smiley v. Kansas*, 196 U.S. 447, 455 (1905); *Quong Ham Wah Co. v. Industrial Acci. Com.*, 255 U.S. 445, 448 (1921); and *Garner v. Louisiana*, 368 U.S. 157, 166 (1961). This Court should not disturb the determination of the Supreme Court of California concerning the structure and powers of a California governmental agency, the State Bar of California.

---

(Continued from previous page)

SAFE-BIDCO (Cal. Fin. C. Sec. 32000, *et seq.* (effective January 1, 1990, Chapter 1040 of the Statutes of 1989 will rename this corporation the State Assistance Fund for Enterprise, Business and Industrial Development Corporation)).

<sup>10</sup> This is not a case in which Congress has sought to regulate an aspect of state government. See, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Furthermore, the structure and function of governmental entities are integral to state sovereignty, unlike the minimum wage and overtime requirements at issue in *Garcia*.

## II. THE ROLE OF THE STATE BAR IN IMPROVING THE ADMINISTRATION OF JUSTICE AND ADVANCING THE SCIENCE OF JURISPRUDENCE SERVES AN IMPORTANT GOVERNMENTAL INTEREST

### A. The State Bar Serves the Public Interest in Improving the Administration of Justice and Advancing the Science of Jurisprudence

As a governmental agency devoted to improving the administration of justice and advancing the science of jurisprudence, the State Bar plays an important and unique role in the legislative process.

The State Bar is closely linked to the Judicial Council through the power to appoint council members and as a constituent agency in the Judicial Branch. These linkages facilitate a coordinated approach to law reform that has resulted in a number of joint efforts by the Judicial Council and State Bar to improve the administration of justice in California. Over 40 years ago, the State Bar and Judicial Council jointly redrafted the rules governing appellate procedure. 14 Cal. St. B.J. 372 (1939); Belcher, *President's Message*, 17 Cal. St. B.J. 357-358 (1942); Belcher, *The Bar and The War*, 18 Cal. St. B.J. 304, 306-308 (1943). Subsequently, the State Bar worked with the judicial Council on revisions to Article VI of the California Constitution pertaining to the judiciary. McAuliffe, *Message of the President*, 23 Cal. St. B.J. 1, 3 (1948). Over the years the State Bar and the Judicial Council have worked together in formulating and sponsoring proposals concerning the selection of judges and the operation of the Commission on Judicial Performance. Finger, *Report of the Board of Governors*, 43 Cal. St. B.J. 635, 636-639 (1968); Casey,



*Annual Report of the Board of Governors*, 51 Cal. St. B.J. 550, 560, 562 (1976); *Annual Report of the Board of Governors*, 50 Cal. St. B.J. 422, 434 (1975); *Annual Report of the Board of Governors*, 49 Cal. St. B.J. 607, 617-618 (1974). Former Chief Justice of the California Supreme Court, Phil S. Gibson, stated in 1957 that "every major reform in which the [Judicial] Council has participated since I have been Chairman has been the joint effort of the State Bar and the Judicial Council . . . ." Gibson, *For Modern Courts*, 32 Cal. St. B.J. 727, 728 (1957).

In recent years, the State Bar and Judicial Council jointly cosponsored a legislative proposal to permit arbitration as an alternative to court trial in superior court cases. Cal. Code of Civ. Proc. Sec. 1141.10, *et seq.* Subsequently, the State Bar assisted the Judicial Council in implementing this arbitration system, including the preparation and adoption of rules for the selection of arbitrators in civil cases pursuant to legislative direction. See Cal. Rules of Court, rule 1600, *et seq.* The State Bar also supported increasing the jurisdictional limits for arbitration. Cal. Code Civ. Proc. Sec. 1141.11. In 1985, these two agencies formed a Joint Commission on Civil Discovery which conducted an extensive study of discovery problems and proposed a new discovery act which was largely adopted by the Legislature as the Civil Discovery Act of 1986. Cal. Code Civ. Proc. Sec. 2016, *et seq.*; *Annual Report*, 5 Cal. Law. 70, 78 (1985). Currently, the State Bar and Judicial Council have formed a Consortium on Trial Court Delay Reduction to implement a major statewide statutory initiative to reduce trial court delay. The State Bar was a cosponsor of that delay reduction statute. Cal. Gov't Code Sec. 68600, *et seq.* Official joint efforts such as

these are possible only because both the Judicial Council and the State Bar are governmental agencies.

As a general matter, the State Bar, as a governmental agency with substantial expertise on legal processes and substantive laws, is a major source of valuable information to the Legislature on legislative proposals. The State bar played a major role in the enactment of the California Administrative Procedures Act. See, e.g., *Proceedings*, 10th Annual Meeting (1937), pp. 138-142; *Proceedings*, 11th Annual Meeting (1938), pp. 83-93, 200, 235, 372; *Proceedings*, 12th Annual Meeting (1939), pp. 36, 69, 172, 180, 193, 278, 283; *Committee on Administrative Agencies and Tribunals - 1941-42*, 18 Cal. St. B.J. 422 (1943); *Report of Committee on Administrative Agencies and Tribunals*, 19 Cal. St. B.J. 284 (1944); *Editorials, Administrative Agencies*, 19 Cal. St. B.J. 1 (1944); Kleps, *The California Administrative Procedures Act*, 22 Cal. St. B.J. 391 (1947). Subsequently, the State Bar has proposed amendments to improve the operation of the act. *Committee Reports, Administration of Justice*, 42 Cal. St. B.J. 708, 715 (1967). The State Bar was also instrumental in the adoption of the Uniform Commercial Code (Gray, *Report of the Board of Governors*, 39 Cal. St. B.J. 40, 50-51 (1951)), the Evidence Code (Mack, *President's Message*, 40 Cal. St. B.J. 119 (1965); Mack, *Annual Report of the Board of Governors*, 40 Cal. St. B.J. 659, 665 (1965)) and the most recent comprehensive revision of the Corporations Code (*Annual report of the Board of Governors*, 50 Cal. St. B.J. 422, 437 (1975)).

In 1981, with State Bar sponsorship and support, the Legislature enacted a program administered by the State Bar to use mandatory interest on lawyers' trust accounts (IOLTA) to assist the funding of legal service programs

for the poor. Secs. 6210-6228. In 1982 the State Bar proposed and the Legislature enacted a statutory will that eliminated the need to use an attorney to prepare simple wills. Cal. Pro. Code Sec. 6200, *et seq.*

Former California legislators have noted the importance of the State Bar's legislative activities. For example, in 1961, State Senator Edwin J. Regan, Chairman of the Senate Judiciary Committee commented:

"It is inconceivable that these expressly delegated responsibilities and functions [under Sec. 6031] could be carried out effectively and successfully without recourse to legislative activity - that is, without proposing legislation and making known the bar's recommendations to legislative committees. The results of the State Bar's studies and recommendations on many subjects of tremendous complexity and importance would virtually be lost to the members of the Legislature if it were not possible for your legislative representatives to appear as advocates before legislative committees." Regan, *The State Bar's Role in the Legislature*, 36 Cal. St. B.J. 951-952 (1961)

To be useful, the State Bar's input to the Legislature must be timely. Comments on legislative proposals must be submitted to the Legislature within the tight deadlines for committee and floor action. Throughout its history the State Bar has functioned effectively within these legislative deadlines. The Legislature would lose an irreplaceable resource if the State Bar were prevented by burdensome procedures from communicating with the Legislature in a timely manner.

The State Bar provides the Legislature with legal expertise in both procedural and substantive areas relating to the science of jurisprudence and the administration of justice. Individual lawyers and regional and local bar associations have no obligation to provide this expertise to the Legislature. Furthermore, the State Bar's input to the Legislature is unique in that the knowledge of the experienced practitioners is provided by an agency whose structure and legislative oversight assures a public interest perspective.

Through its positions on matters relating to the science of jurisprudence and the administration of justice, the State Bar has exercised a leadership role in the public interest even in the face of opposition by regional and specialty bar associations and individual lawyers. Public protection has been a central concern of major legislative proposals made by the State Bar. On several occasions the State Bar has proposed a requirement that all practicing lawyers in California be covered by professional liability insurance. In connection with its most recent proposal, the State Bar conducted a mandatory survey of its members pursuant to a statutory requirement. Sec. 6033. This survey, although unpopular with many attorneys, was considered necessary by the Legislature and the State Bar to provide information on the relationship between the absence of professional liability insurance and public harm from uninsured lawyers. The State Bar also proposed mandatory continuing legal education, and the Legislature recently enacted this proposal. 1989 Cal. Stat. 1425. Many lawyers opposed these proposals, although they would provide additional protection to the public, on the ground that they were not in the economic interest of lawyers. In 1989, the State Bar sponsored a bill to streamline the procedure for a superior court to assume

jurisdiction over the practice of an attorney who is incapable of devoting the time and attention to, and providing the quality of service for, his or her clients because of the excessive use of alcohol or drugs, physical or mental illness or other infirmity or other cause. 1989 Cal. Stat. 582.

This public interest orientation is also reflected in other proposals made by the State Bar for improving the administration of justice. The Trial Court Delay Reduction Act, which the State Bar cosponsored in 1986, requires greater judicial management and control of civil cases by judges. The discovery reforms which the State Bar and Judicial Council cosponsored in 1985 included constraints on discovery. These proposals reflect the State Bar's concern for improving the administration of justice and the science of jurisprudence even in the face of opposition from substantial segments of the legal profession.

As structured and regulated, the State Bar's position on legislative matters are those of the State Bar as an entity. When the State Bar takes a position, it does not purport to speak for, and the Legislature does not consider the position to represent the views of, the majority of lawyers or individual lawyers in the State. J.A. Vol. II at 232-233. The State Bar's position on a matter relating to the science of jurisprudence or the administration of justice is an institutional position, like that of any other governmental entity.

The State Bar also has no monopoly on access to the Legislature. Like other public agencies, the State Bar is simply one voice among many. Regional and specialty bar

associations and individual lawyers have substantial input into the legislative process. Indeed, unlike these private groups and individuals, the State Bar as a governmental agency makes no campaign contributions, does not endorse candidates for office, and is prohibited from taking positions on ballot issues. The State Bar has not drowned out private communication from individual lawyers or regional or specialty bar associations in the legislative process. The fact that the State Bar has taken positions on legislation has not prevented any lawyer in the State, or any group of lawyers, from taking opposing positions.

#### **B. Issues Pertaining to the Administration of Justice and the Science of Jurisprudence are Inherently Political and Ideological**

Petitioners and supporting amici urge this Court to limit the State Bar's participation in "political" and "ideological" issues based on the application of standards applied to labor unions. In the labor union context, the labels "political" and "ideological" may have meaning in the contrast between public issues in the political arena with the private, largely economic, issues in labor-management interactions. These labels are inappropriate, however, for delineating the proper scope of the State Bar's activities.

By statute, the State Bar of California is authorized to "aid in all matters pertaining to the advancement of the science of jurisprudence or the improvement of the administration of justice." Sec. 6031. As matters of public policy and government which can only be resolved in the



Legislature and the Courts, issues pertaining to the administration of justice and the science of jurisprudence are inherently political. Issues of civil and criminal procedure, administrative procedure, selection of judges, strategies for reducing trial and appellate court delay, alternative dispute resolution mechanisms, the structure and jurisdiction of particular courts, and the adequacy of representation in civil and criminal cases are some of the matters relating to the science of jurisprudence and the administration of justice which the California Legislature and the State Bar have considered on a regular basis. At certain times, these issues are relatively noncontroversial, even when substantial changes are proposed. At other times, they are highly controversial. Whether controversial or not, they are all "political." They are at the heart of what government is about. Consequently, petitioners' claim that the State Bar be required to specifically justify any position in a "political" matter would potentially sweep within it every issue regarding the science of jurisprudence and the administration of justice.

In addition, these issues pertaining to the science of jurisprudence and the administration of justice are inherently "ideological." "Ideology" has been defined as "visionary speculation" and "a systematic scheme or coordinated body of ideas or concepts [especially] about human life or culture." Webster's Third New International Dictionary (1981 unabridged). In the broad sense all administration of justice issues are ideological: our system of justice is premised on an ideology of fairness, due process, and equal protection.

As asserted by petitioners and amici, the categories of "political" and "ideological" are labels used to

describe positions of the State Bar with which they disagree. These are purely subjective terms in the context of issues of public policy and government. In practical effect, these labels would permit those who disagree with the positions of governmental agencies to exercise a veto over governmental speech.

The California Legislature intends that the State Bar, and other governmental agencies with special expertise and skills, participate when issues regarding the administration of justice or the science of jurisprudence are considered by the Legislature. We believe this participation is in the public interest. It is important that the Legislature continue to receive the positions of the State Bar unfettered by disruptive litigation or procedures designed to restrict the Legislature's access to the valuable input which the State Bar has long provided on matters relating to the science of jurisprudence and the administration of justice.

---

## CONCLUSION

For the foregoing reasons, amicus curiae urges this Court to affirm the decision of the California Supreme Court.

Respectively Submitted,

BION M. GREGORY  
Legislative Counsel  
3021 State Capitol  
Sacramento, CA 95814  
(916) 445-3057

(21)

No. 88 - 1905

Supreme Court, U.S.

FILED

DEC 18 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

**KELLER, et al.,**

*Petitioners,*

v.

**STATE BAR OF CALIFORNIA, et al.,**

*Respondents.*

On Writ Of Certiorari To The Supreme Court Of California

**BRIEF OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS, JOINED BY THE  
FLORIDA BAR, THE NEW HAMPSHIRE BAR ASSOCIATION,  
THE STATE BAR OF MONTANA, THE OKLAHOMA BAR ASSOCIATION,  
THE WASHINGTON STATE BAR ASSOCIATION,  
AND THE WYOMING STATE BAR**

*Of Counsel:*

**PAUL F. HILL**  
General Counsel  
**BARRY S. RICHARD**  
Of Counsel to  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300  
(904) 561-5600

**STEPHEN L. TOBER**  
Counsel for  
The New Hampshire Bar Association  
Aeschliman & Tober, P.A.  
381 Middle Street - P.O. Box 1151  
Portsmouth, New Hampshire 03801  
(603) 431-1002

**JOHN S. SKILTON \***  
**WILLIAM M. CONLEY**  
**ROBERTA F. HOWELL**  
**FOLEY & LARDNER**  
1 South Pinckney Street  
Post Office Box 1497  
Madison, Wisconsin 53701-1497  
(608) 257-5035

*\* Counsel of Record for  
Amicus Curiae*

32198

## TABLE OF CONTENTS

---

	PAGE
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
I.	
A BRIEF REVIEW OF THE HISTORY OF THE INTEGRATED BAR CONCEPT DEMON- STRATES ITS LONG-ACCEPTED ROLE IN PROMOTING PROFESSIONALISM AND FA- CILITATING LAW REFORM .....	5
II.	
RECENT FIRST AMENDMENT CASE LAW IS CONSISTENT WITH THE HISTORICAL ROLE PLAYED BY INTEGRATED BARS IN LAW REFORM EFFORTS .....	10
III.	
STATE COURTS, LEGISLATURES, AND IN- TEGRATED BARS HAVE DEVELOPED PRO- GRAMS AND ACCOMMODATED DISSENT IN THE MANNER BEST SUITED TO THE NEEDS OF THAT INDIVIDUAL STATE .....	13
A. The Integrated Bar in Wisconsin .....	14
B. The Integrated Bar in Florida .....	18
C. The Integrated Bar in New Hampshire ..	21
CONCLUSION .....	25



## TABLE OF AUTHORITIES

CASES:	PAGE
<i>Aboud v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977) ..	10, 11
<i>Bishop v. State Bar of Texas</i> , 791 F.2d 435 (5th Cir. 1986) .....	3
<i>Chicago Teachers Union Local No. 1 v. Hudson</i> , 475 U.S. 292 (1986) .....	17
<i>Crosetto, et al. v. Heffernan, et al.</i> , Case No. 88-C-433-C (W.D. Wis.) .....	3
<i>Ellis v. Brotherhood of Ry. Clerks</i> , 466 U.S. 435 (1984) .....	10, 12
<i>Gibson v. The Florida Bar</i> , 798 F.2d 1564 (11th Cir. 1986) .....	9, 13, 19
<i>Gibson v. The Florida Bar</i> , No. TCA 84-7109-MMP (N.D. Fla. May 2, 1989), appeal docketed, No. 88-3388 (11th Cir. May 3, 1989) .....	20
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975) .	13
<i>Hollar v. Government of the Virgin Islands</i> , 857 F.2d 163 (3d Cir. 1988) .....	9, 13
<i>In re Amendment to Integration Rule of the Florida Bar</i> , 439 So. 2d 213 (Fla. 1983) .....	19
<i>In re Florida Bar Bd. of Governors' Action</i> , 217 So. 2d 323 (Fla. 1969) .....	19
<i>In re Integration of the Bar</i> , 249 Wis. 523, 25 N.W.2d 500 (1946) .....	15
<i>In re Integration of the Bar</i> , 5 Wis. 2d 618, 93 N.W.2d 601 (1958) .....	15

<i>In re Regulation of the Bar of Wisconsin</i> , 81 Wis. 2d xxxv (1978) .....	16
<i>In re Unification of the New Hampshire Bar</i> , 109 N.H. 260, 248 A.2d 709 (1968) .....	23
<i>In re Unified New Hampshire Bar</i> , 112 N.H. 204, 291 A.2d 600 (1972) .....	21
<i>In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)</i> , 127 Wis. 2d xi (1986) ...	17
<i>In the Matter of the Integration of the Bar</i> , 273 Wis. 281, 77 N.W.2d 602 (1956) .....	15
<i>In the Matter of the Petition to Review State Bar By-law Amendments</i> , 139 Wis. 2d 686, 407 N.W.2d 923 (1987) .....	17
<i>In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar</i> , 93 Wis. 2d 385, 286 N.W.2d 601 (1980) .....	16
<i>Integration of Bar Case</i> , 244 Wis. 8, 11 N.W.2d 604 (1943) .....	14
<i>Lathrop v. Donohue</i> , 10 Wis. 2d 230 (1960), <i>aff'd</i> , 367 U.S. 820, <i>reh'g denied</i> , 368 U.S. 871 (1961) ..	2, 9, 11, 16
<i>Levine v. Supreme Court of Wisconsin</i> , 679 F. Supp. 1478 (W.D. Wis.), <i>rev'd sub nom. Levine v. Heffernan</i> , 864 F.2d 457 (7th Cir. 1988), <i>cert. denied</i> , ___ U.S. ___, 110 S. Ct. 204 (1989) ..	2, 3
<i>Mallard v. United States District Court</i> , ___ U.S. ___, 109 S. Ct. 1814 (1989) .....	12
<i>Petition of Chapman</i> , 128 N.H. 24, 509 A.2d 753 (1986) .....	21, 22, 23
<i>Petition of Florida State Bar Ass'n</i> , 40 So. 2d 902 (Fla. 1949) .....	18

<i>Petition to Review Bar Amendments</i> , 139 Wis. 2d 686, 407 N.W.2d 923 (1987) .....	17
<i>Report of Committee to Review the State Bar</i> , 112 Wis. 2d xix, 334 N.W.2d 544 (1983) .....	16, 17
<i>Rules Regulating The Florida Bar: The Florida Bar re Amendment to Rule 2-9.3</i> , 526 So. 2d 688 (Fla. 1988) .....	20
<i>Schneider v. Colegio de Abogados de Puerto Rico</i> , 682 F. Supp. 674 (D.P.R. 1988) .....	9
<i>State ex rel. Armstrong v. Board of Governors</i> , 86 Wis. 2d 746, 273 N.W.2d 356 (1979) .....	16
<i>Supreme Court of Virginia v. Friedman</i> , 487 U.S. 59 (1988) .....	12
<i>The Florida Bar Re: Schwarz</i> , 526 So. 2d 56 (Fla. 1988) .....	19
<i>The Florida Bar Re: Thomas R. Schwarz</i> , No. 70,702 (Fla. Oct. 26, 1989) .....	19, 20
<i>Werle v. Rhode Island Bar Ass'n</i> , 755 F.2d 195 (1st Cir. 1985) .....	3

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Fla. Const. art. V, § 15 .....	18
Wis. Stat. § 256.31 (1943) .....	14
Wis. S.C.R. 10.02(2) .....	9
Wis. S.C.R. 10.03(5)(b) .....	17
Wis. S.C.R. Ch. 10 App. State Bar By-law § 9(b) ..	17

#### OTHER AUTHORITIES:

Adams, <i>The Self-Governing Bar</i> , 26 Am. Pol. Sci. Rev. 470 (1932) .....	6
Address, 16 <i>New Hampshire Law Weekly</i> 101 (July 19, 1989) .....	24
Address to New York State Bar Association (Jan. 20, 1922), reprinted in <i>The Public Function of the Bar: Chairman Goodwin of Conference of Bar Associations Includes Lawyer Legislators in Programme for Integrated Bar</i> , 5 J. Am. Judicature Soc'y 181 (1922) .....	8
<i>Bar Association Act</i> , 2 J. Am. Judicature Soc'y 111 (1918) .....	7
<i>Bar Services Report</i> , 62 Fla. B.J. 13 (1989) ...	18
Cohen, <i>The National Call for the Organization of An All Inclusive Bar</i> , 4 N.Y.L. Rev. 81 (1926) ..	7
Gaebler, <i>First Amendment Protection Against Government Compelled Expression and Association</i> , 23 B.C.L. Rev. 995 (1982) .....	11
Gordon, <i>The Organization of the Canadian Bar</i> , 4 Ore. L. Rev. 200 (1925) .....	6
Harley, <i>A Lawyer's Trust</i> , 7 Neb. State Bar A. Proc. 143, reprinted in 29 J. Am. Judicature Soc'y (1945) .....	6
6 <i>Holdsworth's History of English Law</i> (1924) ..	6
Jackson, <i>Compulsory Incorporation of the Bar from the Country Lawyer's Viewpoint</i> , 4 N.Y.L. Rev. 316 (1926) .....	7
<i>Legislative Policy &amp; Procedure of the Florida Bar</i> , 62 Fla. B.J. 123 (1989) .....	19

Lund, <i>The Legal Profession in England and Wales</i> , 35 J. Am. Judicature Soc'y 134 (1952) .....	5, 6
R. Pound, <i>The Lawyer from Antiquity to Modern Times</i> (1953) .....	5
President's Annual Report, Rhode Island Bar J. 3 (June/July, 1987) .....	22
Rules Regulating the Florida Bar, 2-3.2, 62 Fla. B.J. 47 (1989) .....	18
Rules Regulating the Florida Bar, 2-9-3, 62 Fla. B.J. 52 (1989) .....	19
To Speed Bar Organization: Committee of Amer- ican Bar Association Conference of Delegates Reports on Existing Need and Proffers Prac- tical Advice, 4 J. Am. Judicature Soc'y 83 (1920) .....	7
Winters, <i>Integration of the Bar—You Can't Lose</i> , 39 J. Am. Judicature Soc'y 140 (1956) .....	6

No. 88-1905

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---



---

KELLER, *et al.*,  
Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,  
Respondents.

---



---

On Writ Of Certiorari To The Supreme Court Of California

---

**BRIEF OF THE STATE BAR OF WISCONSIN  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS, JOINED  
BY THE FLORIDA BAR,  
THE NEW HAMPSHIRE BAR ASSOCIATION,  
THE STATE BAR OF MONTANA,  
THE OKLAHOMA BAR ASSOCIATION,  
THE WASHINGTON STATE BAR ASSOCIATION,  
AND THE WYOMING STATE BAR**

---

By consent of the parties,<sup>1</sup> the State Bar of Wisconsin ("Wisconsin Bar") submits this brief in support of respondents, who seek affirmance of the decision of the Supreme Court of California upholding the right of the State Bar

---

<sup>1</sup> Consistent with this Court's Rule 36.2, the original, written consents of the parties accompany the filing of this *amicus* brief.



of California, as an integrated bar, to use dues to finance activities, other than election campaigning, which are germane to its statutory mission to promote "the improvement of the administration of justice." The Wisconsin Bar has been authorized to state that the following integrated bars join in this brief: The Florida Bar, the New Hampshire Bar Association, the State Bar of Montana, the Oklahoma Bar Association, the Washington State Bar Association, and the Wyoming State Bar.

### INTEREST OF AMICUS CURIAE

The Wisconsin Bar was established as an integrated bar under interim rules promulgated by the Supreme Court of Wisconsin in 1956. Two years later integration became permanent. The court's integration rule was upheld in the face of a First Amendment challenge in *Lathrop v. Donohue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961). In 1988, the Wisconsin Supreme Court nevertheless was prompted to suspend its long-standing integration rule by a decision of the District Court for the Western District of Wisconsin declaring the rule unconstitutional. See *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 204 (1989).

Despite the reversal of that decision by the Seventh Circuit, litigation against the Wisconsin Supreme Court and the Wisconsin Bar continues in the Western District of Wisconsin. In addition to the original suit for injunctive and monetary relief brought by a single plaintiff who has asserted that the Bar must defend each and every activity under a compelling interest/least restrictive means test,

a second, purported class action is now being pursued by separate counsel, claiming entitlement, among other relief, to some \$500,000 in compensatory and \$600,000 in punitive damages. *Crosetto, et al. v. Heffernan, et al.*, Case No. 88-C-433-C (W.D. Wis). These monetary claims are based in part on the Wisconsin Supreme Court's and the Bar's alleged delay in instituting a dues reduction plan for sums spent on legislative activities.<sup>2</sup>

As a result of the uncertainty created by these lawsuits, as well as this Court's grant of *certiorari* in *Keller*, the Wisconsin Supreme Court has continued to postpone any decision regarding the return of the Wisconsin Bar to integrated status.<sup>3</sup>

This background gives the Wisconsin Bar an acute awareness of the potential for disruption that has been, and may be caused, if concerns for protection of First Amendment interests of dissenting members are permitted ultimately to overwhelm the substantial public benefits derived from integrated bars. As the *Keller* lawsuit and suits in other jurisdictions demonstrate, the Wisconsin Bar's experience is not altogether unique. If the First Amendment interests at stake are read as expansively as urged by a number of the *amici* supporting the petitioners, the integrated bar

<sup>2</sup> Courts have differed on whether integrated bars are entitled to Eleventh Amendment protection. Compare *Bishop v. State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986), with *Levine*, 679 F. Supp. at 1487-88. In a subsequent unpublished opinion, the district court in *Levine* also suggested that the Wisconsin Bar may not be entitled to qualified immunity. But see *Werle v. Rhode Island Bar Ass'n*, 755 F.2d 195 (1st Cir. 1985) (Rhode Island Bar entitled to absolute or qualified immunity in action by doctor challenging state unauthorized practice of law statute).

<sup>3</sup> During 1988 and 1989, the Wisconsin Bar has experienced an approximate drop in membership of 15% to 20%, reducing total membership from approximately 15,000 to 12,500.

concept upheld by this Court in *Lathrop* would be rendered unworkable. Indeed, many of the *amicus* briefs are subtle (and not so subtle) efforts to overturn the *Lathrop* ruling or to achieve a similar result indirectly.

Accordingly, the Wisconsin Bar's interest in this appeal, as well as the interest of the integrated bars joining in this brief, extends not just to urging that integrated bars across the country continue to be permitted to lend their expertise to discussions of law reform and policy, whether through lobbying or providing information to legislatures and courts. The interest extends more generally to urging that this Court not accept the invitation of petitioners and supporting *amici* to adopt a new or modified First Amendment standard which will unduly restrict the diverse structures and important and innovative activities of integrated bars that now help to promote the fair and efficient administration of justice in this country.

#### SUMMARY OF ARGUMENT

---

From the outset of the integrated bar movement early in this century, state integrated bars have been charged with promoting professionalism and facilitating law reform. Contrary to the assertions of petitioners and supporting *amici*, recent First Amendment case law is not inconsistent with an integrated bar's historical participation in law reform efforts. In particular, the First Amendment does not prohibit an integrated bar from lobbying or providing information to legislatures and courts as long as those activities are germane to the bar's important public purposes, including the improvement of the administration

of justice. While integrated state bars across the country have followed diverse methods of fulfilling their public obligations, and of accommodating dissent among their members, this diversity has contributed to the rich history and current vitality of the integrated bar movement. To adopt a new restrictive, federal standard for a bar's legislative advocacy will needlessly destroy that diversity, and may well destroy the viability of the integrated bar itself as dissenters push federal courts for an ever broadening notion of what is "political" or "ideological."

#### ARGUMENT

---

##### I.

#### A BRIEF REVIEW OF THE HISTORY OF THE INTEGRATED BAR CONCEPT DEMONSTRATES ITS LONG-ACCEPTED ROLE IN PROMOTING PROFESSIONALISM AND FACILITATING LAW REFORM.

As with so many of our legal doctrines and institutions, the integrated bar concept is traceable to England. In *The Lawyer from Antiquity to Modern Times* (1953), Dean Pound explained that through the Inns of Court "English lawyers at the end of the middle ages had become a well developed, well organized profession, maintaining a system of societies or associations promoting a professional tradition, providing adequate training of those who were to enter the profession, and actively furthering the development of the law." *Id.* at 87-88. Over time, courts delegated the responsibility of admitting and disciplining barristers to the Inns. *Id.* at 99-100; Lund, *The Legal Profession in England and Wales*, 35 J. Am. Judicature Soc'y 134, 135-36 (1952).

Barred from admission to the Inns of Court, solicitors or attorneys formed their own professional organization, The Law Society. 6 *Holdsworth's History of English Law* 442-43 (1924). While The Law Society was said to be "voluntary," Parliament charged it with powers over solicitors comparable to those of the Inns over barristers, including the training, examination and admission of solicitors, as well as the power to suspend a license, impose fines, charge a license fee and require contribution to a security fund for clients. Lund, *supra*, at 139-41.

In the late eighteenth century, the lawyers of Upper Canada (now Ontario) formed a Law Society similar to the English professional organizations. By the early 1900's, lawyers were required to join and pay dues to similar organizations in every Canadian province. The Society in each province was governed by a representative board (Benchers) whose responsibilities included the supervision of legal education, examination of those seeking bar admission and suspension and disbarment, subject to court review. See Adams, *The Self-Governing Bar*, 26 Am. Pol. Sci. Rev. 470, 470-71 (1932); Gordon, *The Organization of the Canadian Bar*, 4 Ore. L. Rev. 200, 200-01 (1925).

Influenced by his observations of the Canadian Bar system while visiting Toronto in 1914, Herbert Harley, founder and secretary of the American Judicature Society, resolved to promote integration in the United States. Winters, *Integration of the Bar—You Can't Lose*, 39 J. Am. Judicature Soc'y 140, 141 (1956). In a historic address at Lincoln, Nebraska that same year, Harley called for the creation of an all-inclusive bar as a means of reforming and improving the profession and society as a whole. Harley, *A Lawyer's Trust*, 7 Neb. State Bar A. Proc. 143, reprinted in 29 J. Am. Judicature Soc'y 50 (1945). This call for integration struck a responsive chord for those in the pro-

fession who had become discouraged by the inability of voluntary bars—restricted by low memberships, meager budgets and divisions along social, ethnic and racial lines, as well as areas of practice—to improve admission and disciplinary standards or to foster significant law reform.<sup>4</sup>

In 1918, the American Judicature Society published a proposed integrated bar act which granted to the bar extensive powers over admission, discipline, and disbarment. *Bar Association Act*, 2 J. Am. Judicature Soc'y 111 (1918). The next year the Conference of Bar Association Delegates of the American Bar Association appointed a committee on state bar organization. The committee submitted its report to the Conference in 1920 in St. Louis recommending the creation of state integrated bars. It found that the voluntary associations had done some fine work but were inadequate for the task of elevating the profession. It pointed out that members of the bar of a state have definite legal status as a part of the machinery of state government and constitute a body politic; that they are the advising and moving officers of the court, just as the members of the bench are its deciding and decreeing officers; that a lawyer's responsibilities before the court are similar to those of a government official and not of a private citizen; and hence that the entire bar of a state should be organized and should function in legal recognition of the fact that it is a body politic and an integral part of the judicial department. *To Speed Bar Organiza-*

<sup>4</sup> The integrated bar movement in the 1920's counted among its supporters many of the country's leading legal figures, including Charles Evans Hughes, Elihu Root, John W. Davis, Dean Wigmore, and Robert H. Jackson. See Cohen, *The National Call for the Organization of An All Inclusive Bar*, 4 N.Y.L. Rev. 81, 81-83, 135-36 (1926); Jackson, *Compulsory Incorporation of the Bar from the Country Lawyer's Viewpoint*, 4 N.Y.L. Rev. 316 (1926).



tion: *Committee of American Bar Association Conference of Delegates Reports on Existing Need and Proffers Practical Advice*, 4 J. Am. Judicature Soc'y 83 (1920). The report called to the conference's attention

the fact that this is the only civilized nation in the world in which the judicial bar is not a self-governing, responsible body politic, and it is likewise the only civilized nation in which the title of a lawyer does not carry with it a guarantee of professional integrity and responsibility.

*Id.* at 85.

Speaking from his own experience, the committee's head, Judge Clarence N. Goodwin of Chicago, said:

How has the bar been governed in the past? It is said that it has been governed by courts, but this is true only in a most restricted sense. It has been my privilege to sit upon the bench both in the trial and appellate courts and I know how impossible it is for those in that isolated position to exert any practical control over the actions of the thousands who constitute the bar. Naturally the only effective action courts are able to take is upon information submitted to them, usually by the voluntary bar associations, and if we are frank with ourselves, we must admit that such efforts at bar government have been in the greater part a failure.

Address to New York State Bar Association (Jan. 20, 1922), reprinted in *The Public Function of the Bar: Chairman Goodwin of Conference of Bar Associations Includes Lawyer Legislators in Programme for Integrated Bar*, 5 J. Am. Judicature Soc'y 181, 183 (1922).

North Dakota became the first state to have an integrated bar. Two years later statutes were passed creating integrated bars in Idaho and Alabama. While their structures vary from state to state, today 32 states, other than

Wisconsin, have functioning integrated bars.<sup>5</sup> Integration in these states has been accomplished by (1) legislative action in the form of detailed statutes, or (2) legislative action authorizing the state supreme court to integrate the bar, or (3) promulgation of rules by the state supreme court by virtue of its inherent judicial power to regulate the profession.

Given the perceived need for law reform, it is hardly surprising that regardless of whether the source of the bar's power to act was derived through judicial or legislative action, or both, among the express purposes of the integrated bars in virtually all of these states is "improving the administration of justice." See, e.g., Wis. S.C.R. 1.02(2).

Similarly, it should not be surprising that courts have generally held, as did the Supreme Court of California in *Keller*, that an integrated bar may use its dues to lobby the legislature for law reform believed likely to enhance the fair and efficient administration of justice in the state. See, e.g., *Lathrop*, 367 U.S. at 864 (Harlan, J., concurring); *Hollar v. Government of the Virgin Islands*, 857 F.2d 163, 170-71 (3d Cir. 1988); *Gibson v. The Florida Bar*, 798 F.2d

<sup>5</sup> Alabama (1923), Alaska (1955), Arizona (1933), Arkansas (1938), California (1927), Florida (1949), Georgia (1964), Hawaii (1989), Idaho (1923), Kentucky (1934), Louisiana (1940), Michigan (1935), Mississippi (1930), Missouri (1944), Montana (1974), Nebraska (1937), Nevada (1929), New Hampshire (1968), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oklahoma (1939), Oregon (1935), Rhode Island (1973), South Carolina (1975), South Dakota (1931), Texas (1939), Utah (1931), Virginia (1938), Washington (1933), West Virginia (1945), and Wyoming (1939). In addition, integrated bars have been established in the District of Columbia, the Virgin Islands and Puerto Rico, though the latter was struck down as unconstitutional on grounds unique to its structure and activities. See *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674, 681-91 (D.P.R. 1988).

1564, 1566 (11th Cir. 1986). To hold otherwise would be to deprive legislatures and the courts of input from a ready source of expertise on a wide range of legal subjects, and frustrate one of the fundamental purposes of the integrated bar movement.

## II.

### RECENT FIRST AMENDMENT CASE LAW IS CONSISTENT WITH THE HISTORICAL ROLE PLAYED BY INTEGRATED BARS IN LAW REFORM EFFORTS.

Despite this historical perspective, petitioners assert that the rulings of this Court in the context of labor unions now establish that the lobbying activities of the State Bar of California ("California Bar") violate their First Amendment rights. The California Bar addresses in its brief the question of whether these cases apply to the speech of a governmental agency. That issue will not be addressed here. Even if applicable to speech by the California Bar, petitioners misapply the reasoning of this Court's union cases to the integrated bar setting.

The principal lesson of the union cases is that once compelled membership in an organization is itself found to be justified by important governmental interests, individual activities of the association need only be "germane" to those interests. *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 447-57 (1984). See also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977) (an individual may not withdraw his financial support from acts that promote "the course which justified bringing the group together"). This general proposition derives from the Court's view that it has "already countenanced a significant impingement on First Amendment rights" in "allowing the union shop at all." *Ellis*, 466 U.S. at 456. Thus, assuming the integrated bar is justified by important public interests,

the expenditures by the bar in furtherance of those interests are permissible, unless the "expenses involve additional interference with First Amendment interests of objecting [members]" not "adequately supported by a governmental interest." *Id.* See also Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1016 (1982) ("In other words, negative First Amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa.").

In upholding the constitutionality of the integrated bar in *Lathrop*, this Court's plurality opinion reviewed at length the activities of the Wisconsin Bar in light of the multiple purposes assigned the Bar by Wisconsin Supreme Court Rule upon integration:

[T]o aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.

*Lathrop*, 367 U.S. at 828-29 (quoting Wis. S.C.R. 1, § 2 (1956)). While broad in scope, these public purposes are consistent with the broad aspirations for integrated bars generally, and are certainly of a kind with those that caused

the Court to countenance a First Amendment impingement in the union context.

Thus, this Court's decision in *Lathrop* upholding the constitutionality of the integrated bar readily justifies most activities of the bar. The fact that an integrated bar member may be forced to contribute to activities intended to ensure ethical conduct and attorney competence or to provide a forum for the discussion of law "does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the [bar]." *Ellis*, 466 U.S. at 456. "Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Id.* Indeed, this Court has never undermined the general notion that lawyers may properly be required to provide certain public services regardless of personal preference. See *Mallard v. United States District Court*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1814, 1823 (1989) (expressly reserving the question whether federal courts "possess inherent authority to require lawyers to serve"); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, \_\_\_, 108 S. Ct. 2260, 2267 (1988) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985)) ("A 'nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.'").

Admittedly, an integrated bar's involvement in direct lobbying of the legislature—as opposed to fostering the study or discussion of legislative proposals or providing technical assistance to the legislature or the courts—may involve an additional impingement on the First Amendment rights of dissenting members. But this activity is also among the most fundamental public and historical purposes of an integrated bar: the promotion and improvement of the administration of justice through advocacy

of law reform. As such, the activity is more than "adequately supported by a governmental interest." Indeed, improving the administration of justice is a state interest of the most compelling kind; it is an interest every bit as vital to our free society as maintaining labor peace, as important as that interest is. Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (recognizing the importance of regulating lawyers "since lawyers are essential to the primary governmental function of administering justice"). The compelling importance of this role of integrated bars was recognized by both the Eleventh Circuit in *Gibson*, 798 F.2d at 1568, and the Third Circuit in *Hollar*, 857 F.2d at 170.<sup>6</sup>

### III.

#### STATE COURTS, LEGISLATURES, AND INTEGRATED BARS HAVE DEVELOPED PROGRAMS AND ACCOMMODATED DISSENT IN THE MANNER BEST SUITED TO THE NEEDS OF THAT INDIVIDUAL STATE.

Almost from the outset of the integration movement in this country, integrated bars have undergone periodic reexamination, by bar committees, by courts and by legislatures. Much of this reevaluation has concerned accom-

<sup>6</sup> In *Gibson*, the Eleventh Circuit acknowledged that in determining the acceptable areas for state bar lobbying, the purpose of improving the administration of justice "could arguably extend unlimited discretion to the Bar." 798 F.2d at 1569. That Circuit therefore suggested that for purposes of its lobbying activity the bar "construe 'improving the administration of justice' as pertaining to the role of the lawyer in the judicial system and in society." *Id.* In the case of lobbying activities, the Eleventh Circuit noted the "collective expertise of lawyers . . . grounded in their longstanding relationship with the courts" and suggested that lobbying activities "that infringe upon individual rights should relate directly to that expertise." *Id.*



modation of the interests of dissenting members. This experience has demonstrated the commitment of state courts, legislatures, and bars to respond to concerns of dissenting members in a manner consistent with the number of lawyers, size of the state and broad public policy goals of the individual state. The experiences of Wisconsin, Florida and New Hampshire are illustrative, though not unique. Their experiences, as well as those of California, demonstrate that a stricter federal standard—and commensurate federal judicial oversight—is not needed and not good public policy.

#### A. The Integrated Bar in Wisconsin.

In 1943, the Wisconsin legislature enacted a statute purporting to establish "an association to be known as 'the state bar of Wisconsin' composed of persons licensed to practice law in this state" and making "membership in the association . . . a condition precedent to the right to practice law in Wisconsin." Wis. Stat. § 256.31 (1943). The Wisconsin Supreme Court construed the statute as an advisory legislative declaration that integration of the bar would promote the general welfare of the state. *Integration of Bar Case*, 244 Wis. 8, 50, 11 N.W.2d 604, 624 (1943). The court further acknowledged its authority and responsibility to regulate the practice of law in the state and its discretionary power as to both the time and form of integration. The court nevertheless deferred any decision regarding integration. *Id.* at 54-55, 11 N.W.2d at 625.

Three years later, in a short opinion, the court again declined to integrate the bar, intimated that the objectives sought by integration could be attained by an adequately supported voluntary association and urged the whole hearted support of the voluntary association by in-

dividual members of the bar. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

Ten years later, noting that "too many lawyers have refrained or refused to join [the voluntary association], that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association," the court ordered integration of the bar on an interim basis. *In the Matter of the Integration of the Bar*, 273 Wis. 281, 283, 77 N.W.2d 602, 603-04 (1956).

Following a two-year trial period, the court made the integrated Wisconsin Bar permanent. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958). In that decision, the court noted:

Under integration the State Bar has increased its services to the lawyers of this state, promoted the high standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice.

*Id.* at 621, 93 N.W.2d at 602. In answer to the suggestion that integration of the bar was undemocratic, the court observed:

It is not undemocratic to require those who are privileged to practice law and are entrusted with the duty to secure or protect the property, rights and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group and to increase the effectiveness of their service to the public. The integrated Bar has been defined as "the process by which every member of the Bar is given an opportunity to do his share in carrying out the public service of the Bar and obliged to bear his portion of the responsibility."

*Id.* at 622-23, 93 N.W.2d at 603.

The Wisconsin Supreme Court soon had occasion to review the constitutionality of the integrated bar in *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961). In upholding the integrated bar, the court quoted approvingly the declaration by its distinguished former chief justice, Marvin Rosenberry, in his 1943 *Integration of Bar* decision "that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation." *Id.* at 238, 102 N.W.2d at 408.

The court further noted that the rules and by-laws of the Wisconsin Bar "do not compel the plaintiff to associate with anyone, . . . [t]he only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues." *Id.* at 237, 102 N.W.2d at 408. Noting the benefits of the integrated bar, including its function of "securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law," the court determined that an integrated bar promotes the public interest in a way that "far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues." *Id.* at 238-42, 102 N.W.2d at 409-10.

Since *Lathrop*, the structure, purposes and activities of the Wisconsin Bar have undergone repeated and detailed review by the Wisconsin Supreme Court and by special committees the court has appointed for that purpose. See *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1978); *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 273 N.W.2d 356 (1979); *In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980); *Report of Com-*

*mittee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W. 2d 544 (1983); *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)*, 127 Wis. 2d xi (1986); *In the Matter of the Petition to Review State Bar By-law Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987).

While the Wisconsin Supreme Court has consistently upheld mandatory support of the Wisconsin Bar on the grounds that the integrated Bar is better suited to fulfill the obligations of the bar to the public, see *Report of Committee*, 112 Wis. 2d at xxi, 334 N.W.2d at 546, the court also has repeatedly taken steps to accommodate the interests of dissenting members. In particular, the Wisconsin Bar is not permitted to engage in any direct political endorsements or campaigning. *Id.* at xxv, 334 N.W.2d at 549. Any advocacy position taken by the Wisconsin Bar on legislation also requires formal approval by 60% of its democratically-elected Board of Governors. Wis. S.C.R. Ch. 10 App. State Bar By-laws § 9(b).<sup>7</sup> Without deciding whether it was constitutionally required, the supreme court also developed a rebate procedure and ultimately a "dues reduction" plan permitting objectors to deduct their *pro rata* share of bar dues expended for legislative activities at the outset of each fiscal year. See Wis. S.C.R. 10.03(5)(b).<sup>8</sup>

<sup>7</sup> In fiscal year 1987, the Wisconsin Bar spent approximately 1.3% of dues collected on legislative advocacy. In fiscal year 1988, it spent approximately 1.6%.

<sup>8</sup> On April 19, 1986, the Wisconsin Bar Board of Governors adopted a by-law providing for an arbitration proceeding consistent with *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), in the event a dispute arises between the Bar and a member concerning the allocation of expenditures to "legislative activities" as defined under Wis. S.C.R. 10.03(5)(b)1. See *Petition to Review Bar By-law Amendments*, 139 Wis. 2d at 689-94, 407 N.W.2d at 925-27.

## B. The Integrated Bar in Florida.

The Florida Bar is an official arm of the Supreme Court of Florida, initially integrated pursuant to that court's inherent power and now authorized by that tribunal's exclusive constitutional authority to regulate and discipline persons admitted to the practice of law in Florida. *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); Fla. Const. art. V, § 15.

In its original opinion which integrated The Florida Bar, the Supreme Court of Florida specifically reviewed and favorably noted the involvement of the integrated bar of California within the legislative arena. *Petition of Florida State Bar Ass'n*, 40 So. 2d at 905. Consequently, The Florida Bar has actively participated in the legislative process since its formal integration in 1950.<sup>9</sup> The Bar's legislative positions are formulated through an open process culminating in formal action by its governing board.

Limitations on legislative activity are provided by Florida Supreme Court-promulgated Rules Regulating the Florida Bar and other codified legislative policies and procedures, and court opinions interpreting those provisions. The Florida Bar's charter document authorizes, with "continued direction and supervision by the Supreme Court of Florida," a program for "providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law." *Rules Regulating The Florida Bar 2-3.2*, 62 Fla. B.J. 47 (1989). Under applicable policies, neither The Florida Bar nor any of its committees may take a posi-

<sup>9</sup> The full range of the Bar's legislative activities constitute 2.5% of the organization's 1989-90 operating budget of \$14.1 million. *Bar Services Report*, 62 Fla. B.J. 13, 30-31 (1989).

tion on legislation, either as proponent or opponent, unless the Bar's governing board initially determines that the matter is related to the codified purposes of the organization. Adoption of any legislative position requires a subsequent affirmative vote of two-thirds of those present at any regular meeting of the Bar's 51-member Board of Governors, two-thirds of the organization's Executive Committee or the Bar president. As a further safeguard, the Bar's Board of Governors, Legislative Committee and Executive Committee allow appearances of any interested persons during consideration of any legislative proposal. Legislative topics pending for consideration are previewed in the Bar's official member publications and final Board action on such matters is noted in subsequent news accounts for appropriate member followup. See *In re Amendment to Integration Rule of The Florida Bar*, 439 So. 2d 213, 214-15 (Fla. 1983); *Rules Regulating The Florida Bar 2-9.3*, 62 Fla. B.J. 52 (1989); *Legislative Policy and Procedure of The Florida Bar*, 62 Fla. B.J. 123 (1989).

Appellate court review of The Florida Bar's legislative activities has occurred at both the federal and state level. See *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *The Florida Bar Re: Thomas R. Schwarz*, No. 70,702 (Fla. Oct. 26, 1989); *The Florida Bar Re: Schwarz*, 526 So. 2d 56 (Fla. 1988); *In re Amendment to Integration Rule of the Florida Bar*, 439 So. 2d 213 (Fla. 1983); and *In re Florida Bar Bd. of Governors' Action*, 217 So. 2d 323 (Fla. 1969).

During the pendency of the *Gibson* appeal, this Court handed down its decision in *Chicago Teachers' Union*. With the added benefit of the subsequent opinion in *Gibson*, the Bar further refined its procedures governing the use of compulsory dues for legislative activities. Those new procedures were submitted to the Supreme Court



of Florida for review and were approved on June 2, 1988. *Rules Regulating The Florida Bar: The Florida Bar re Amendment to Rule 2-9.3*, 526 So. 2d 688 (Fla. 1988).<sup>10</sup>

In its ongoing review and oversight of the Bar's legislative activities, the Supreme Court of Florida has recently reiterated its support of existing policies while adopting further guidelines for determining the scope of permissible lobbying activities of The Florida Bar. The court emphasized continued sensitivity to individual member concerns with this additional admonition:

However, we also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar. In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court.

*The Florida Bar re: Thomas R. Schwarz*, No. 70,702, slip op. at 7 (Fla. Oct. 26, 1989).

<sup>10</sup> The Bar's Rules and Procedures provide an explanation of the basis for the Bar's calculation of dues monies attributable to its legislative activities; a reasonably prompt opportunity to challenge the amount of such calculation or the propriety of a legislative position before an impartial decisionmaker; and an escrow option for those amounts reasonably in dispute while such legislative challenges are pending. By unpublished order, the Northern District of Florida found the provision met the safeguards and requirements necessary for protection of members' First Amendment rights set out in both *Chicago Teacher's Union* and the Eleventh Circuit opinion in *Gibson v. The Florida Bar*, No. TCA 84-7109-MMP (N.D. Fla. May 2, 1989), appeal docketed, No. 89-3388 (11th Cir. May 3, 1989).

### C. The Integrated Bar in New Hampshire.

Petitioners in the instant case cite approvingly the New Hampshire Supreme Court's decision in *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (1986). They offer *Chapman* for its recognition of the union cases, and for acknowledging the potential risks to negative First Amendment freedoms posed by political activities of an integrated bar. Petitioners' Opening Brief at 18-19. Yet petitioners' characterization of *Chapman* belies the greater lessons that the decision truly presents.

When the New Hampshire Supreme Court ordered permanent unification in 1972 (following a three-year trial period), it commented upon the issue of legislative activity and noted:

Clearly, it is open to any member to participate in the formulation of policies, and if need be to oppose association action in the legislative field. The objection deserves consideration by the association, but does not require restoration of the association to a voluntary status.

*In re Unified New Hampshire Bar*, 112 N.H. 204, 207, 291 A.2d 600, 602 (1972).

Fourteen years later, the New Hampshire Supreme Court was not displeased with what it had done. Noting that "the constitutionality of the integrated, or unified, bar is not at issue here," the *Chapman* court went on to add:

The Association has played a crucial role in maintaining and upgrading the quality of the bar in New Hampshire. The lawyer referral network has increased the availability of, and access to, lawyers in this State. Its public education and information efforts have been exemplary, and its continuing education program is among the best. The various committees of the Association provide substantive and procedural assistance

both to the bar and to the courts. Unification of the bar may not be the sole reason for these successes, but we are confident that it has played a substantial role in contributing to these accomplishments.

128 N.H. at 29, 509 A.2d at 757.

The decision in *Chapman* goes well beyond a recognition of concern for negative First Amendment rights; it offers a "balancing test" between those rights and the Bar's "core responsibilities." *Id.* at 30-31, 509 A.2d at 758. The notion that a unified bar must refrain from all political activity, or that a dues rebate is required—the root of petitioners' assertions before this Court—are expressly rejected in *Chapman*. *Id.* at 40, 509 A.2d at 764-65. Consideration of the Bar's "core responsibilities" is not taken lightly, either in *Chapman* or in earlier New Hampshire Supreme Court decisions.

When the court went on to find that the Bar had exceeded its authority in opposing certain legislation, it issued not a "draconian" prohibition of all lobbying, *id.* at 40, 509 A.2d at 764, but rather a balancing test of competing interests, and offered further guidelines and redefinition of those important "core responsibilities." *Id.* at 31-32, 509 A.2d at 758-59. *See also id.* at 41, 509 A.2d at 765-66 (Souter, J., concurring).

The lessons of *Chapman* have been implemented throughout the entire legislative advocacy process, assuring review consistent with *Chapman* on at least two levels for every piece of legislation considered by the New Hampshire Bar.<sup>11</sup>

<sup>11</sup> The Rhode Island Bar Association, also integrated, decided to be "generally guided" by the *Chapman* decision as well. *See President's Annual Report*, Rhode Island Bar J. 3, 4 (June/July, 1987).

First, the Legislation Committee of the New Hampshire Bar Association, appointed annually by the Bar President to represent a cross-section of the Bar membership, conducts a review of each bill to assure compliance with *Chapman*. That is followed in relatively short order by a *de novo* second review by the Bar's Board of Governors, a group of twenty-one individuals elected by democratic process, with an annual turnover rate of approximately one-third. Throughout the process the Bar Association's legislative representative is fully involved, offering his or her *Chapman* perspective as well.

This process acts to secure all of the balancing and guidance that the *Chapman* decision demands. At both levels "circumspection is the watchword," *id.* at 32, 509 A.2d at 759 (*see also In re Unification of the New Hampshire Bar*, 109 N.H. 260, 266, 248 A.2d 709, 713 (1968)), and caution is employed "[w]here substantial unanimity does not exist or is not known to exist within the bar as a whole." *Chapman*, 128 N.H. at 32, 509 A.2d at 759.<sup>12</sup> Those with dissenting views from within the Bar membership have, on occasion, been invited to the Board debate, with the resulting exchanges proving productive.

Furthermore, since the Bar has responded to *Chapman*, it has more frequently taken an informational position on legislation and it has been recognized for its achievement. In his address at the 1989 Bar Association Annual Meeting, Chief Justice David A. Brock, author of the majority opinion in *Chapman*, commented that "it hasn't gone unnoticed at the Supreme Court that the Bar Association has managed to be a constructive force in the legislative

<sup>12</sup> In fiscal year 1988-89, the New Hampshire Bar spent approximately 2% of dues collected on legislative advocacy.

process while at the same time complying with the requirements of the *Chapman* case." Address, 16 *New Hampshire Law Weekly* 101, 104 (July 19, 1989).

With the experiences of Wisconsin, Florida, New Hampshire and numerous other integrated bars across the country as examples, it is clear that petitioners' requested relief is quite undesirable and unnecessary. At least in the case of California, as its Supreme Court expressly found, the requested relief would also be unworkable.

The diversity that exists among the many unified bars, large and small, urban and rural, serves as a successful medium for self-reliance and self-governance. The integrated bar has also served as a vehicle by which state courts, restricted by limited resources, can effectively supervise the bar and help ensure sound law reform. The balance of competing interests—between those of individual practitioners and the integrated bar's "core responsibilities"—inherent in the bar is best accomplished by continuing to leave to each state legislature and court the responsibility of fashioning its individual bar in the manner most likely to meet that state's needs.

## CONCLUSION

---

For all the reasons stated, integrated bars should be permitted to continue to fulfill their historic role in shaping law reform, and to fulfill the broader public policies for which they were established. Accordingly, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

*Of Counsel:*

PAUL F. HILL  
General Counsel  
BARRY S. RICHARD  
Of Counsel to  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(904) 561-5600

STEPHEN L. TOBER  
Counsel for  
The New Hampshire Bar  
Association  
Aeschliman & Tober, P.A.  
381 Middle Street  
P.O. Box 1151  
Portsmouth, NH 03801  
(603) 431-1002

JOHN S. SKILTON \*  
WILLIAM M. CONLEY  
ROBERTA F. HOWELL  
FOLEY & LARDNER  
1 South Pinckney Street  
Post Office Box 1497  
Madison, WI 53701-1497  
(608) 257-5035

\* *Counsel of Record for  
Amicus Curiae*



DEC 10 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
 October Term, 1989

EDDIE KELLER, et al.,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, et al.,

*Respondents.*

On Writ Of Certiorari In The California Supreme Court

**BRIEF OF AMICUS CURIAE BEVERLY HILLS BAR  
 ASSOCIATION IN SUPPORT OF RESPONDENTS**

HORVITZ &amp; LEVY

ELLIS J. HORVITZ

PETER ABRAHAMSON\*

KATHY L. ELDREDGE

15760 Ventura Boulevard

18th Floor

Encino, California 91436

(818) 995-0800 and

(213) 872-0802

*Attorneys for Amicus Curiae***Beverly Hills Bar Association**

Joined by Alameda County

Bar Association

Bar Association of

San Francisco

California Foundation of

Small Bar Associations

Chinese Lawyers' Association

Contra Costa County

Bar Association

Culver/Marina Bar

Association

Executive Board of

Lawyers Club of

Los Angeles County

Glendale Bar Association

Hollywood Bar Association

Inyo-Mono County Bar

Association

Japanese American Bar  
AssociationKorean American Bar  
Association

of Southern California

La Raza Lawyers Association  
of San DiegoLawyers' Club of San  
FranciscoLos Angeles County Bar  
AssociationMerced County Bar  
AssociationMexican-American Bar  
AssociationNational Lawyers Guild,  
San Francisco Bay Area  
ChapterOrange County Bar  
Association

Placer County Bar Association

San Diego Bar Association

San Gabriel Valley Bar  
AssociationSanta Clara County Bar  
AssociationSouth Bay Bar Association of  
Los Angeles CountyWomen Lawyers' Association  
of Los Angeles

\*Counsel of Record

28/14

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTERESTS OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	5
I. THE STATE BAR OF CALIFORNIA HAS PLAYED A VITAL ROLE IN THE ADMINIS- TRATION OF JUSTICE IN CALIFORNIA FOR OVER SIXTY YEARS .....	5
A. The State Bar Is Authorized By Statute To Speak Out On Matters Related To The Ad- vancement Of The Science Of Jurisprudence And The Administration Of Justice.....	5
B. California Has A Significant, If Not Com- pelling, Interest In Assuring The State Bar Fulfills Its Statutory Mandate.....	6
1. The State Bar Advises The Legislature On Pending Legislation And Provides Expert Legal Advice On Matters Affect- ing The Administration Of Justice.....	6
2. The State Bar Educates And Protects The Public Against The Unauthorized And Unethical Practice Of Law And Seeks To Insure Competent Representa- tion Is Available To All.....	11
II. IF PETITIONERS PREVAIL IN THIS ACTION, THE STATE BAR WILL BE UNABLE TO FUL- FILL ITS VITAL FUNCTIONS. NO OTHER ENTITY OR GROUP OF ENTITIES IS AVAIL- ABLE TO FILL THE GAP.....	14

## TABLE OF CONTENTS - Continued

	Page
III. THE FIRST AMENDMENT WAS NEVER INTENDED TO BE USED AS A WEAPON TO CURTAIL FREE SPEECH .....	16
A. The Objectives Of The State Bar Differ Significantly From Those Of A Labor Union. Accordingly, The State Bar Should Not Be Judged By The Same Constitutional Standards Which Apply To Labor Unions.....	16
B. Petitioners' Claimed Impingements Of First Amendment Rights Are Either Nonexistent Or So Minimal That, When Weighed In The Balance, The Public Interest Favors Permitting The State Bar To Function Unhampered .....	17
CONCLUSION .....	22

## TABLE OF AUTHORITIES

	Page
CASES	
Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..	7, 16
Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984).....	7, 16
Hamilton v. Regents of The University of Cal., 293 U.S. 245 (1934) .....	20
Keller v. State Bar, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989).....	7, 19
Lathrop v. Donohue, 367 U.S. 820 (1961) (Harlan, J., concurring) .....	<i>passim</i>
Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988) .....	7
Roberts v. United States Jaycees, 468 U.S. 609 (1984) .....	7
West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624 (1942) .....	20
STATUTES	
California Business & Professions Code	
sections 6000-6228 (West Supp. 1989).....	5
section 6001 (West Supp. 1989).....	16
section 6001(g) (West Supp. 1989) .....	5
section 6012 (West Supp. 1989).....	18
section 6014 (West Supp. 1989).....	18
section 6028(a) (West Supp. 1989) .....	5
section 6031(a) (West Supp. 1989) .....	2, 6



## TABLE OF AUTHORITIES – Continued

Page

section 6140.5 (West Supp. 1989) .....	12
section 6152 (West Supp. 1989) .....	11
California Civil Procedure Code section 2016 (West Supp. 1989) .....	10
California Government Code	
section 10307 (West 1980) .....	6
section 12011.5 (West 1989) .....	6
section 68725 (West Supp. 1989) .....	6
RULES	
California Rules of Court, rule 983 (West Supp. 1989) .....	12
TEXTS	
<i>Supporting Legal Services Delivery and Access</i> , Dec. 1986 California Lawyer .....	10
<i>Legal Services Delivery and Access</i> , Dec. 1987 Cali- fornia Lawyer .....	10
MISCELLANEOUS	
California Constitution, article VI .....	5, 9, 16
San Francisco Banner Daily Journal, Sept. 19, 1989 ....	15

No. 88-1905

In The

## Supreme Court of the United States

October Term, 1989

EDDIE KELLER, et al.,

v.

*Petitioners,*

STATE BAR OF CALIFORNIA, et al.,

*Respondents.*

On Writ Of Certiorari In The California Supreme Court

BRIEF OF AMICUS CURIAE BEVERLY HILLS BAR  
ASSOCIATION IN SUPPORT OF RESPONDENTS

## INTERESTS OF AMICUS CURIAE

Amicus curiae the Beverly Hills Bar Association and the joining bar associations are voluntary bar associations in the State of California. The Beverly Hills Bar Association is located in Beverly Hills, California, and consists of approximately 3000 members. The joining bar associations represent literally tens of thousands of California attorneys. The Court's actions in this case will significantly affect the interests of these attorneys, both as members of a voluntary bar and as members of the State Bar of California (the "State Bar"). If petitioners prevail in this lawsuit, the State Bar will be unable to carry out its programs in furtherance of its statutory mandate – the advancement of the science of jurisprudence and the

improvement of the administration of justice. Voluntary bars, such as amicus the Beverly Hills Bar Association and the joining bars, cannot fill the gap. They are too numerous and diverse, and have different purposes and agendas than the State Bar.

Respondents must necessarily focus on the constitutional issues presented in this case, and therefore may be unable to emphasize sufficiently the important public purposes served by the State Bar. As one of the largest voluntary bars in the state, the Beverly Hills Bar Association is in a position to demonstrate the importance of the State Bar and the role it has played in insuring the quality of legal services provided in California and in promoting the fair and efficient administration of justice. Through this brief amicus curiae, the Beverly Hills Bar Association hopes to provide the Court with an historical perspective on the functions of the State Bar and the impact which reversal of the California Supreme Court's decision would have on the people of California and the members of the bar alike.

The consent of counsel for both petitioners and respondents has been obtained and is being filed with Court.

### SUMMARY OF ARGUMENT

The State Bar of California is charged by statute with promoting the public interest in obtaining quality legal representation and improving the administration of justice. Cal. Bus. & Prof. Code § 6031(a) (West Supp. 1989). In furtherance of these important duties, the Bar regularly provides the Legislature and the public with the

composite judgment of its members on matters directly affecting the administration of justice and the practice of law. Petitioners seek to curtail this function on the theory that the Bar has exceeded its authority by engaging in political and ideological activity with which they disagree, in violation of their Constitutional rights. Under their argument, the State Bar would be barred from taking a position on virtually any matter substantially affecting the administration of justice without the unanimous approval of its membership. Petitioners contend, however, the public interest in promoting the efficient administration of justice will continue to be fulfilled without any concomitant infringement of their First Amendment rights if voluntary bars associations assume responsibility for many of the State Bar's advisory functions.

Petitioners are wrong. If they succeed in hobbling the State Bar, no other entity or group of entities is available to fill the gap. Voluntary bar associations will be unable to fulfill its functions in an efficient and meaningful way. The activities of the State Bar undertaken in fulfillment of its statutory charge are too numerous and too demanding in time and resources to be performed effectively by voluntary bar associations. Moreover, there are simply too many local bars, each with its own agenda, to permit a prompt, organized response to a legislative or executive request for assistance. And, unlike the State Bar - a public entity charged with promoting the public welfare - the voluntary bars, as private organizations, are free to promote the interests of their members exclusively without regard to the interests of the public.

Furthermore, the State's interest in advancing the science of jurisprudence and the administration of justice

is an inherently political one. In practice, it would be virtually impossible to distinguish between the activities of which petitioners complain and those activities which everyone, even petitioners, agree would legitimately further the efficient administration of justice. Given the threat of personal liability faced by members of the Bar's governing body, it is likely that, if petitioners' proposed rule is adopted, the Bar would refrain from addressing all but the most uncontroversial of topics.

Finally, the claimed impingements of petitioners' First Amendment rights are so minimal and abstract that the public interest favors permitting the State Bar to function unencumbered. As a democratic organization, the State Bar encourages its members to help determine the Bar's program. The mere payment of dues to an organization which later utilizes a portion of those dues to support proposed legislation democratically endorsed by a majority of its members does not result in a compelled affirmation of belief by the dues payor in its content. Furthermore, the State Bar does not speak on behalf of its individual members. To the contrary, its members are free to disagree with positions espoused by the Bar and to advocate publicly against them.

In sum, California's interest in promoting the efficient administration of justice is sufficiently compelling to justify the *de minimus* intrusion on petitioners' First Amendment rights resulting from the use of a portion of compelled membership dues to support causes with which they disagree. As Justice Harlan observed almost thirty years ago, "[i]t is exceedingly regrettable that such specious contentions as appellant makes in this case should have resulted in putting the Integrated Bar under

this cloud of partial unconstitutionality." *Lathrop v. Donohue*, 367 U.S. 820, 865 (1961) (Harlan, J., concurring).

---

## ARGUMENT

### I.

#### THE STATE BAR OF CALIFORNIA HAS PLAYED A VITAL ROLE IN THE ADMINISTRATION OF JUSTICE IN CALIFORNIA FOR OVER SIXTY YEARS.

##### A. The State Bar Is Authorized By Statute To Speak Out On Matters Related To The Advancement Of The Science Of Jurisprudence And The Administration Of Justice.

The State Bar of California was created by the Legislature in 1927, and was later established as a constitutional entity by public referendum. See Cal.Const. art VI. The State Bar Act, California Business and Professions Code sections 6000-6228 (West Supp. 1989), designates the State Bar as a public corporation and enumerates its powers. The State Bar is empowered to "[d]o all . . . acts . . . necessary or expedient for the administration of its affairs and the attainment of its purposes," including the appropriation and disbursement of State Bar funds. *Id.* §§ 6001(g), 6028(a).

Of particular importance to the issues involved in this case, the State Bar is expressly authorized to address matters of a governmental nature:

The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and



such matters as concern the relations of the bar with the public.

*Id.* § 6031(a). Thus, the State Bar is encouraged and in some situations required to advise and assist the Legislature, other governmental entities and the public on matters singularly within the expertise of its members. See also Cal. Gov't Code § 68725 (West Supp. 1989) (compelling State Bar to cooperate with and assist the Commission on Judicial Performance); Cal. Gov't Code § 12011.5 (West Supp. 1989) (requiring State Bar to evaluate the judicial qualifications of nominees for appointment to the courts of record); Cal. Gov't Code § 10307 (West 1980) (authorizing Board of Governors of the State Bar to assist the Law Revision Commission).

**B. California Has A Significant, If Not Compelling, Interest In Assuring The State Bar Fulfills Its Statutory Mandate.**

**1. The State Bar Advises The Legislature On Pending Legislation And Provides Expert Legal Advice On Matters Affecting The Administration Of Justice.**

Almost thirty years ago, this Court recognized the public interests served by the integration of the bar: the maintenance of high standards of conduct in the legal profession and the promotion of the efficient administration of justice. *Lathrop*, 367 U.S. at 828-32, 843. These interests are no less compelling today.<sup>1</sup> The California

<sup>1</sup> In their opening brief, petitioners contend the interest necessary to justify the State Bar's intrusion on their First

(Continued on following page)

Supreme Court has called the efficient administration of justice, the " 'laudable general purpose of the [State Bar] act.' " *Keller v. State Bar*, 47 Cal. 3d 1152, 1160, 767 P.2d 1020, 1024, 255 Cal. Rptr. 542, 546 (1989) (quoting *Herron v. State Bar*, 212 Cal. 196, 199, 298 P. 474, 475 (1931)). The California Supreme Court's "view in this respect can [hardly] be considered in any way unreasonable." *Lathrop*, 367 U.S. at 862, 864 (Harlan, J., concurring) ("I can

(Continued from previous page)

Amendment rights must be "compelling" ones. Petitioners' Opening Brief (OB) at 13, 23-25. However, the decisions which directly discuss the issue of compelled membership – *Lathrop*, 367 U.S. 820, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984) – speak only in terms of "legitimate" state interests. Petitioners cite this Court's opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), as requiring a "compelling" state interest to justify infringements on freedom of association. OB at 13. However in *Roberts*, the intrusion on the Jaycees members' First Amendment rights – the forced admission of women to a voluntarily formed all-male organization – was far more significant than the intrusion on petitioners' rights resulting from the use of their compelled dues in ways with which they disagree. See *Roberts*, 468 U.S. at 622-23. Moreover, nothing in *Roberts* can be seen as overruling, implicitly or otherwise, the Court's holdings in *Lathrop*, *Ellis* and *Abood*. See also *Levine v. Heffernan*, 864 F.2d 457, 460-63 (7th Cir. 1988) (holding *Lathrop*'s legitimate state interest test has not been implicitly overruled in later Supreme Court decision). While amicus curiae firmly believes all California need show is a legitimate state interest, even if the State Bar's activities must be judged by the more stringent compelling state interest test, California's interest in promoting the science of jurisprudence and the efficient administration of justice is sufficiently compelling to justify the minimal intrusion on petitioners' First Amendment rights resulting from the use of compelled membership dues. See section III. B., *infra*.

only regard as entirely gratuitous a contention that there is anything less than a most substantial state interest in Wisconsin having the views of the members of its Bar 'on measures directly affecting the administration of justice and the practice of law' ").

For over sixty years the California State Bar has been actively involved in assisting the Legislature on matters of legal reform and the administration of justice. The benefit of such an arrangement is obvious. As Justice Harlan observed:

"[T]he composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law" may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. State and federal courts are, of course, indifferent to the personal beliefs and predilections of any of such groups. The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their usefulness in the judicial decision-making process.<sup>2</sup>

<sup>2</sup> It is of no small significance that when *Lathrop* was written thirty-one jurisdictions had "permanent legislative service agencies which recommend[ed] 'substantive' legislative programs and forty-two jurisdictions utilize[d] such permanent agencies in recommending statutory revision." *Lathrop*,

(Continued on following page)

*Id.* at 863 (Harlan, J., concurring). And, as the Executive Secretary of the New York Law Revision Commission commented, "there are areas in which 'lawyer[s] as lawyers have more to offer, to solve a given question, than other skilled persons or groups.'" *Id.* (Harlan, J., concurring) (quoting 40 Cornell L.Q. 641, 644).

Page constraints prevent us from providing the Court with a complete list of the State Bar's activities in this regard. We therefore present only selected examples. For a more complete discussion of the Bar's legislative involvement, see Joint Appendix (JA) Vol. I at 198.

In 1928, the State Bar formed the Committee on Constitutional Amendments and the Committee on Revision of the Corporation Laws. The latter committee studied and proposed a complete revision of California corporation laws, which was ultimately enacted by the Legislature in 1931. JA Vol. I at 203.

In the 1940's, the State Bar, in cooperation with the Judicial Council, studied and redrafted the rules governing appellate procedure and sponsored legislation giving the Judicial Council authority to prescribe these rules in civil and criminal cases. In addition, the State Bar and the Judicial Council conducted an intensive study aimed at reorganizing California's lower court structure and revising article VI of the California Constitution. JA Vol. I at 206.

(Continued from previous page)

367 U.S. at 864 (Harlan, J., concurring) (citing "Permanent Legislative Service Agencies," published by the Council of State Governments).



In 1947, the California Administrative Procedure Act was enacted with the support of the State Bar after nearly ten years of State Bar study and recommendation. JA Vol. I at 206.

During the 1950's, the State Bar, again in cooperation with the Judicial Council, co-sponsored the first major court reorganization in California, which resulted in significant changes in trial court procedure and practice, the structure of the trial courts, appellate court procedure, and criminal law and procedure. JA Vol. I at 208.

In the 1960's and 1970's, the State Bar was instrumental in the Legislature's adoption of new pre-trial procedures, the Uniform Commercial Code, the Evidence Code, a revised Corporations Code, the Family Law Act, and the Civil Discovery Act. The State Bar further sponsored the initial legislation permitting arbitration as an alternative to trial and was directed by the Legislature to propose and adopt rules for the selection of arbitrators. JA Vol. I at 210-11.

In 1986, the State Bar co-sponsored the new Civil Discovery Act developed by the State Bar-Judicial Council Joint Commission. *Supporting Legal Services Delivery and Access*, Dec. 1986 California Lawyer 84; see Cal. Civ. Proc. Code § 2016 (West Supp. 1989). The Standing Committee on the Administration of Justice worked with State Assemblyman Elihu Harris on technical amendments necessary for the implementation of the Act. *Legal Services Delivery and Access*, Dec. 1987 California Lawyer 75.

In 1987, The State Bar began working with the Judicial Council and the Administrative Office of the Courts on issues relating to the implementation of the Trial Court Delay Reduction Act of 1986, which established delay reduction projects in the superior courts of nine California counties. *Id.*

These are but a few examples of the State Bar's efforts to fulfill its statutory mandate. However, the State Bar's actions are not limited to proposed legislation regarding technical or procedural areas of the law. The Bar works independently, as well as with the Legislature, to promote the interests of the public in obtaining quality legal representation and to insure the quality of the judicial system.

**2. The State Bar Educates And Protects The Public Against The Unauthorized And Unethical Practice Of Law And Seeks To Insure Competent Representation Is Available To All.**

The State Bar was established primarily in response to the perceived public dissatisfaction with the legal profession and the legal system as a whole. JA Vol. I at 202. Since its creation, the State Bar has consistently strived to enhance the public's confidence by systematically regulating the admission and discipline of attorneys. For example, within the first year of its existence, the State Bar promulgated: (a) Rules of Procedure for handling complaints against attorneys; (b) Rules of Professional Conduct establishing high standards for attorney behavior; and (c) Rules Regulating Admission To Practice Law. JA Vol. I at 202. Shortly thereafter, the State Bar Act was amended at the urging of the State Bar to proscribe ambulance chasing, running the capping, practices which seriously undermined the public's confidence in the legal community. Cal. Bus. & Prof. Code § 6152 (West Supp. 1989). JA Vol. I at 204.



In 1931, the State Bar established a public education program designed to educate attorneys regarding their obligation to the public and to educate the public regarding the functions of the profession and the legal system. JA Vol. I at 205.

In 1959, a study committee appointed by the Board of Governors of the State Bar recommended the establishment of a client security fund supported by membership dues. The Client Security Fund was eventually enacted by the Legislature in 1971. Cal. Bus. & Prof. Code § 6140.5 (West Supp. 1989). JA Vol. I at 209.

In 1972, in an effort to protect California residents against improper conduct committed by out-of-state attorneys in California, the California Supreme Court, upon recommendation of the State Bar, adopted a rule making out-of-state attorneys appearing as counsel pro hac vice subject to the jurisdiction of the California courts and the disciplinary jurisdiction of the State Bar. Cal. Rules of Court, rule 983 (West Supp. 1989). JA Vol. I at 212.

Today, the State Bar continues to enforce professional standards through disciplinary action, certification of Practical Training of Law Students, development and revision of the Rules of Professional Conduct, the issuance of ethics opinions and the maintenance of an ethics hotline, enforcement of statutes proscribing the unauthorized practice of law, administering the Client Security Fund, and the continuing education of lawyers. JA Vol. I at 200.

Another area of State Bar Concern is the availability of quality legal representation to all residents of California, in particular to those who are unable to afford such services. As early as 1928, the State Bar formed the Legal Aid Committee to foster the creation of local legal aid committees and panels of attorneys willing to donate their services to indigents and persons of moderate income. JA Vol. I at 203. Later, during the Second World War, the State Bar sponsored a program rendering free legal advice to military personnel and their dependents. JA Vol. I at 207.

During the 1950's, the State Bar commissioned a study to investigate means of delivering legal services to the middle class. The study later resulted in a program designed to encourage group legal service plans in California. JA Vol. I at 209. These programs continue today. JA Vol. I at 213.

Finally, the State Bar has played a prominent role in insuring the quality of the judiciary in California. In 1943, Governor Warren sought the assistance of the State Bar in evaluating the qualifications of proposed appointments to the courts of record. The Bar responded by establishing a Committee on Selection, Qualification, Tenure and Removal of Judges. JA Vol. I at 207. In the 1960's, the State Bar sponsored several plans for improving the judicial selection process, including a proposal for changing the composition of the Commission on Judicial Appointments, a state sponsored commission, to include non-lawyers as well as lawyers and judges. JA Vol. I at 211.

## II.

**IF PETITIONERS PREVAIL IN THIS ACTION, THE STATE BAR WILL BE UNABLE TO FULFILL ITS VITAL FUNCTIONS. NO OTHER ENTITY OR GROUP OF ENTITIES IS AVAILABLE TO FILL THE GAP.**

Petitioners contend the State Bar has exceeded its legislative authority by engaging in "political and ideological activity" with which they disagree. OB at 26. What petitioners ignore, however, is that one of the very purposes which underlies the State Bar's existence – the advancement of the science of jurisprudence and the administration of justice – is inherently political. Although petitioners would have this court limit the State Bar's activities to areas of vital public concern, such line-drawing is impossible. In practice the activities objected to by petitioners could not be easily distinguished from those political activities which everyone, even petitioners, would agree legitimately further the efficient administration of justice.

Virtually any position the State Bar might take on any subject would doubtless be personally offensive to some members of the bar. How could a member of the State Bar's Board of Governors, for example, determine which items of proposed legislation affecting the court system or the legal profession are safe to comment on and which items involve "political" matters beyond the Bar's purview? Because it would be impossible to draw the line between permissible and impermissible activities, and because the individual members of the Board of Governors would face the specter of personal liability whenever they crossed that indefinable line, adoption of

petitioners' proposed rule would deter the State Bar from speaking out on all but the most innocuous subjects.

But if the State Bar is silenced, no other entity or group of entities is available to fill the gap. The voluntary bars, like this amicus, the Beverly Hills Bar Association, and the joining bar associations, are too numerous and diverse to offer coherent and timely responses to legislative or executive requests for assistance on pending legal matters or to protect the public from incompetent or unethical practitioners.<sup>3</sup> Indeed, the voluntary bars exist to serve an entirely different function than the State Bar. As voluntary organizations, they are comprised of individual attorneys who have joined together to advance a particular agenda (e.g., the interests of minority practitioners or those who practice in a particular geographic location or legal specialty). Although they also seek to improve the administration of justice, unlike the State Bar, they are free to promote the interests of their members without regard to the interests of the general public.

In sum, the activities of the State Bar cannot be meaningfully reproduced on the local level. Rather, an integrated State Bar is necessary to achieve the purposes for which it was established.

---

<sup>3</sup> To date, there are over 200 voluntary bars in operation throughout California. San Francisco Banner Daily Journal, Sept. 19, 1989, at 1, col. 5.



## III.

THE FIRST AMENDMENT WAS NEVER INTENDED TO BE USED AS A WEAPON TO CURTAIL FREE SPEECH.

**A. The Objectives Of The State Bar Differ Significantly From Those Of A Labor Union. Accordingly, The State Bar Should Not Be Judged By The Same Constitutional Standards Which Apply To Labor Unions.**

The primary objective of the State Bar is the protection of the public interest. Unlike a labor union, the Bar is a governmental agency. *See* Cal. Const. art. VI; Cal. Bus. & Prof. Code § 6001 (West Supp. 1989). Moreover, the public interests served by the Bar are much broader than those of a labor union. The Bar promotes quality legal services and advances the administration of justice. In contrast, the principal function of a labor union is to protect and advance the economic and social interests of its membership through the process of collective bargaining. *See Ellis*, 466 U.S. at 446 (noting the broad scope of union activities "aimed at benefiting union members"). While it is true the process of collective bargaining also benefits the public by promoting labor harmony, *Abood*, 431 U.S. at 219, the goal which fostered the union movement was primarily the improvement of wages and working conditions for a particular group of workers.

Given the legitimate, if not compelling public interests served by the Bar, and, as we demonstrate below, the minimal nature of the intrusion on petitioners' First Amendment rights, it is not unreasonable to require petitioners to tolerate some activities or speech which they find objectionable in order to further the public interests.

**B. Petitioners' Claimed Impingements Of First Amendment Rights Are Either Non-existent Or So Minimal That, When Weighed In The Balance, The Public Interest Favors Permitting The State Bar To Function Unhampered.**

The State Bar functions described above are exactly those referred to by Justice Harlan as "among the most useful and significant branches of [the Bar's] authorized activities." *Lathrop*, 367 U.S. at 848 (Harlan, J., concurring). Petitioners nevertheless seek to curtail many of these activities on the theory that no governmental entity may compel an individual to pay money, a portion of which is ultimately used to support personally repugnant views, even if those views are embraced by a majority of a democratically elected body and the dissenting individual is entitled to separately voice his own opinion. Petitioners in effect seek to silence the State Bar in the name of the First Amendment. However, the First Amendment does not require unanimity of opinion before organized speech may be engaged in. Moreover, the claimed impingement of petitioners' First Amendment rights resulting from the Bar's activities is, at most, minimal.

Petitioners claim they are forced to pay membership dues to support positions with which they disagree. Contrary to their assertions, however, within the organizational framework of the State Bar,

[t]he dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure *about which he will have something to say*. To the extent that his voice of dissent can convince his lawyer associates, it will



later be heard by the State Legislature with a magnified voice.

*Lathrop*, 367 U.S. at 856 (Harlan, J., concurring, emphasis added). Furthermore, "it begs the question to approach the Constitutional issue with the assumption that the majority of the Bar has a permanently formulated position which the dissenting dues payor is being required to support . . . ." *Id.* (Harlan, J., concurring). To the contrary, the State Bar has no set agenda to which its members are required to contribute. Rather, the Bar's program evolves over the course of the year. Its authors include both the executive and legislative branches of state government, the Judicial Council, Section Committees, and the Conference of Delegates. JA Vol. I at 100. And, since the State Bar is organized much like Congress, with elected Board Members from each of nine geographic districts throughout the State, individual members may participate through their elected representatives.<sup>4</sup> See Cal. Bus. & Prof. Code § 6012 (West Supp. 1989).

In short, individual members are free to advocate their own positions, or to oppose those advocated by others. They may seek the election of board members sympathetic to their point of view. However, while the dissenter has a right to oppose the views of the majority, he has no "right not to have [his] opposition heard." *Lathrop*, 367 U.S. at 857 (Harlan, J., concurring). As Justice Harlan noted in *Lathrop*,

<sup>4</sup> Unlike labor unions, the leadership of the State Bar is not entrenched. Five new members of the Board of Governors are elected each year. Cal. Bus. & Prof. Code § 6014 (West Supp. 1989).

the argument under discussion is contradicted in the everyday operation of our society. Of course it is disagreeable to see a group, to which one has been required to contribute, decide to spend its money for purposes the contributor opposes. But the Constitution does not protect against the mere play of personal emotions. We recognized in *Hanson* that an employee can be required to contribute to the propagation of personally repugnant views on working conditions or retirement benefits that are expressed on union picket signs or in union handbills. A federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency. Such examples could be multiplied.

*Id.* (Harlan, J., concurring).

Finally, the payment of mandatory dues which may be used to support legislation which the payor opposes does not amount to the kind of compelled affirmation of belief prohibited by the Constitution. The State Bar of California does not purport to speak on behalf of its individual members. See *Keller v. State Bar*, 47 Cal. 3d at 1158, 767 P.2d at 1023, 255 Cal. Rptr. at 545 (in the trial court, the State Bar submitted declarations stating that when acting in its administration of justice function, it speaks for itself). Nor does it require its members to adopt its views as their own. As set forth above, dissenting members are free to disagree with positions espoused by the Bar and to advocate publicly against them. There is an obvious

difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote

the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

*Lathrop*, 367 U.S. at 858 (Harlan, J., concurring). In the words of Justice Harlan, "the difference in degree is so great as to amount to a difference in substance." *Id.* (Harlan, J. concurring). The mere payment of dues, a portion of which is later used to promote proposed legislation, does not so associate the dues payor with that legislation as to amount to a compelled affirmation of belief in its content. Compare *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1942) (holding unconstitutional statute mandating compulsory pledge of allegiance). Any connection between the proposed legislation and a particular individual is tenuous at best. Moreover, "[t]he right of private judgment had never yet been so exalted above the powers and the compulsion of the agencies of government." *Hamilton v. Regents of The University of Cal.*, 293 U.S. 245, 268 (1934).

In sum, California's interest in promoting the efficient administration of justice is sufficiently compelling to justify the minimal intrusion on petitioners' First Amendment rights resulting from the use of compelled membership dues to support causes with which they disagree. Surely, the First Amendment does not stand for the proposition that a contribution, however small, entitles the contributor to silence an organization on any issue where the contributor opposes the views of the majority of the organization's members. Reducing petitioners' argument to its logical conclusion, the State Bar would be barred from taking a position on virtually any

matter substantially affecting the administration of justice without the unanimous approval of its membership. Moreover, it is inconceivable that the interests which this Court held sufficient to justify compelled membership in and contribution to a unified Bar are somehow insufficient to justify the use of compelled membership dues to further the interests for which the Bar was established in the first place. As Justice Harlan noted,

A state legislature could certainly appoint a commission to make recommendations to it on the desirability of passing or modifying any of the countless uniform laws dealing with all kinds of legal subjects, running all the way from the Uniform Commercial Code to the Uniform Simultaneous Death Law. It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer, doctor, dentist, etc. [Citation.] In these circumstances, wherein lies the unconstitutionality of what [California] has done? Does the Constitution forbid the payment of some part of the Constitutional license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all the members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things?

*Lathrop*, 367 U.S. at 864-65 (Harlan, J., concurring).

Amicus curiae respectfully submits the State Bar's activities meet the requisite constitutional standards, and the California Supreme Court's decision upholding the validity of the Bar's statutory scheme should be affirmed.

---

## CONCLUSION

California has an important, indeed a compelling interest in seeing that the State Bar fulfills its statutorily mandated functions. The claimed infringement on petitioners' First Amendment rights is nonexistent or, at most, trivial. Petitioners have full opportunity to advance their own positions and vote for governors of the State Bar sympathetic to their own point of view. They should not be allowed to silence that organization simply because it advances positions with which they disagree. Accordingly, the California Supreme Court's opinion should be affirmed.

HORVITZ & LEVY  
 ELLIS J. HORVITZ  
 PETER ABRAHAMS  
 KATHY L. ELDREDGE

*Attorneys for Amicus Curiae*  
***Beverly Hills Bar Association***  
*Joined by Alameda County Bar Association*  
*Bar Association of San Francisco*  
*California Foundation of Small Bar Associations*  
*Chinese Lawyers' Association*  
*Contra Costa County Bar Association*  
*Culver/Marina Bar Association*  
*Executive Board of Lawyers Club of Los Angeles County*  
*Glendale Bar Association*  
*Hollywood Bar Association*  
*Inyo-Mono County Bar Association*  
*Japanese American Bar Association*  
*Korean American Bar Association*  
*La Raza Lawyers Association of San Diego*

*Lawyers' Club of San Francisco*  
*Los Angeles County Bar Association*  
*Merced County Bar Association*  
*Mexican-American Bar Association*  
*National Lawyers Guild, San Francisco Bay Area Chapter*  
*Orange County Bar Association*  
*Placer County Bar Association*  
*San Diego Bar Association*  
*San Gabriel Valley Bar Association*  
*Santa Clara County Bar Association*  
*South Bay Bar Association of Los Angeles County*  
*Women Lawyers' Association of Los Angeles*